Metro-West Ambulance Services, Inc. *and* Teamsters Joint Council #37, International Brotherhood of Teamsters and Teamsters Local #223, International Brotherhood of Teamsters.[1] Cases 36–CA–010801, 36–CA–010802, 36–CA–010835, 36–CA–010893, 19–CA–067859, 19–CA–069371, and 19–CA–076875

May 30, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On November 9, 2012, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a brief in support, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a brief in support, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, to amend the remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

The Respondent provides emergency ground ambulance services in Washington County, Oregon, and non-emergency ambulance transport throughout the Pacific Northwest. This case chiefly involves several adverse actions that the Respondent took against Field Training Officer and Senior Paramedic Travis Schlegel, the leading union adherent at the Respondent's Hillsboro, Oregon facility. We adopt the judge's excepted-to unfair labor practice findings and dismissals for the reasons she stated, with the following clarifications.[5]

1. In adopting the judge's finding that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by extending Schlegel's unlawfully issued CAP on March 7, 2011,[6] we agree with the judge that the General Counsel met his initial burden under *Wright Line*, supra, and that the Respondent did not show that it would have taken the same action absent Schlegel's protected union activities.[7] The Respondent's several unexcepted-to violations of Section 8(a)(1) (see supra fn. 2) reflect strong antiunion animus. In finding that this animus motivated the issu-

[1] We correct the judge's inadvertent omission of Charging Party Teamsters Local #223, International Brotherhood of Teamsters from the case caption.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by engaging in unlawful surveillance; enforcing its "Employee Associations" policy to prohibit employees from wearing union pins; promulgating, maintaining, and enforcing a rule prohibiting employees from remaining on its property after the end of their shifts; coercively interrogating an employee; and threatening an employee about his future prospects with the company due to his support for the Union.

We correct the judge's inadvertent dismissal of complaint par. 10(c), which the General Counsel withdrew at the hearing.

[3] We amend the judge's remedy to require the Respondent to make employee Travis Schlegel whole for any loss of earnings and other benefits caused by his unlawful discharge in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and for any loss of earnings and other benefits caused by his unlawful demotion and 1-day suspension in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[4] We will modify the judge's Conclusions of Law and recommended Order to remedy the violations found and in accordance with the Board's standard remedial language. We will order the Respondent to compensate employee Schlegel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating Schlegel's backpay award to the appropriate calendar quarters. We will substitute a new notice to conform to the Order as modified and with *Durham School Services*, 360 NLRB 694 (2014).

[5] In adopting the judge's analyses under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we do not rely on the Respondent's general opposition to unionization.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by suspending, demoting, and issuing a corrective action plan (CAP) to Schlegel in October 2010, we find it unnecessary to pass on the judge's findings concerning Schlegel's October 11, 2010 emails. The judge did not rely on those emails to find the suspension, demotion, and CAP unlawful, and neither do we.

In finding the October 2010 discipline unlawful, we do not rely on the judge's finding that Schlegel was engaged in protected concerted activity. The judge also found that the Respondent would not have initiated any action against him but for Schlegel's comment to his supervisor, "Geeze Kevin, are they trying to get a union out here?" We find that the Respondent thought Schlegel was involved with the union, although he was not involved at that time. Because of the Respondent's mistaken belief, its suspension, demotion, and issuance of a CAP to Schlegel are unlawful. See *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996); *Metropolitan Orthopedic Assn.*, 237 NLRB 427, 427 fn. 3 (1978) ("discharge of 4 employees . . . because of Respondent's belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice. . . .").

Member Schiffer agrees with the judge's finding that Schlegel was engaged in protected, concerted activity, including union activity, in late October 2010, and that this conduct provoked the Respondent's unlawful disciplinary action against him.

In finding that the Respondent unlawfully issued Schlegel and employee Randy Watkins corrective action memoranda (CAM) for parking too far from their assigned posts in August 2011, we correct the judge's inadvertent failure to find that Schlegel's discipline violated Sec. 8(a)(4) of the Act in addition to Sec. 8(a)(3) and (1).

[6] Subsequent dates are in 2011, unless noted otherwise.

[7] We find it unnecessary to rely on the judge's finding that the Respondent's investigation into the January 24 patient complaint was inadequate.

ance of the March 7 CAP, we emphasize that there was a delay in excess of 1 month between the January 24 patient complaint about Schlegel and the March 7 discipline that the complaint purportedly triggered, and the judge discredited Supervisor Kevin Riensche's explanation for that delay.[8] In the interim, Schlegel engaged in prounion activities, including posting prounion flyers on his locker and picketing the Respondent's facility; the Union filed its first charge on Schlegel's behalf; and Schlegel revealed that he was the creator of a prounion Facebook page, of which the Respondent's managers and supervisors were aware. The discipline was issued soon thereafter.[9] Accordingly, we find that the Respondent's decision to extend Schlegel's CAP occurred because Schlegel engaged in prounion activity and the Union filed charges.[10]

2. We adopt the judge's conclusion that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by putting Schlegel on a performance improvement plan (PIP) in July.[11] The record supports an inference that Schlegel's PIP was motivated by animus against Schlegel's union activities and the unfair labor practice charges filed on his behalf, so the burden shifted to the Respondent under *Wright Line,* supra, to prove that Schlegel would have been placed on a PIP in the absence of the charges and of Schlegel's union activities. The Respondent contends that it issued the PIP because, over the course of a year, Schlegel was involved in three patient-related mishaps, including one in April in which Schlegel struck a curb at 40 miles per hour while transporting a patient (by Schlegel's own account, the patient was jostled hard). Although these incidents might legitimately warrant a PIP, the Respondent's burden is to show that it would have issued the July PIP even in the absence of Schlegel's union activity.[12] The judge explained in painstaking detail the basis of her finding that the Respondent did not sustain this burden. For example, several incidents were not the subject of contemporaneous discipline when they occurred; another employee involved in one incident was not disciplined at all; and the record supports the judge's finding that numerous descriptions and explanations provided by the Respondent were false or exaggerated. We are persuaded by the judge's careful and thorough analysis, and we draw an adverse inference from the Respondent's failure to produce accident reports for the period January 1, 2009, to the date of the hearing, which the General Counsel subpoenaed to obtain evidence about the Respondent's treatment of similarly situated employees. In the circumstances presented here, the record fails to establish that the Respondent treated Schlegel in the same manner as other employees who engaged in comparable misconduct, and the records subpoenaed by the General Counsel directly related to potential instances where similarly situated employees were treated more leniently. In agreement with the General Counsel's exception, we find that an adverse inference is warranted that these documents, had they been produced, would be adverse to the Respondent's position.[13]

[8] The judge expressed uncertainty about the date of the patient complaint. The Respondent's witness who took the complaint testified that it was January 24.

[9] In addition to the cases cited by the judge, we rely on *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 637 (2011) (where employer took no action against employee with performance deficiencies until after learning of his union activity, the Board rejected as pretextual the employer's claim that it had decided to terminate him prior to learning of that activity), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012).

[10] The facts underlying the January 24 complaint itself are not disputed. Schlegel and his partner Lai Wah Chan responded to a 911 call from a patient who they determined may have been near death but who initially refused ambulance transport due to the cost. In accordance with established protocol, Schlegel and Chan spoke frankly with the patient about the risks of refusing transport, including the risk of death; and hearing this, the patient's mother and son began to cry. Chan credibly testified that she and Schlegel handled the situation in accordance with their training and how other paramedics handle similar situations, and that Schlegel's tone was professional. We note that Chan and Schlegel appear to have followed the Metro Regional EMS Consortium protocols, which apply to the Respondent's operations in Washington County and are part of the record in this case, for handling a patient with decisionmaking capacity who refuses needed treatment and/or transport. The protocols include enlisting family members "to help convince" the patient and informing the patient of the risks and consequences of refusing transport. They also direct the rapid transport of patients with sub-90 systolic blood pressure. (The patient here had a systolic blood pressure of 70.)

[11] Member Johnson does not find the issuance of the PIP to be unlawful. The PIP was issued to Schlegel mainly because, while driving the ambulance, he struck a curb at 40 miles per hour, jarring the patient "very hard" and causing the patient to come up off the gurney, which resulted in a complaint and claim of injury by the patient. While the PIP also mentions Schlegel's involvement in two other patient mishaps in less than a year, Member Johnson would find that the striking-the-curb incident itself justified the PIP and that it would have been issued to Schlegel even in the absence of his union activity.

[12] See, e.g., *Igramo Enterprise*, 351 NLRB 1337, 1340 (2007), rev. denied 310 Fed. Appx. 452 (2d Cir. 2009).

[13] The only accident report that the Respondent produced is the one that Schlegel submitted after the curb strike. The hearing transcript shows that on the last day of the hearing, the Respondent indicated to counsel for the General Counsel that there may have been more accident reports, but they were not "easily available" and it would take more than a few days to produce them. Although the General Counsel did not ask that the record be left open beyond the last day of the hearing, the Respondent does not explain or otherwise address its failure to produce the reports. It does not claim, for example, that there are no such reports, that they are immaterial, or that producing them would be unduly burdensome.

In her decision, the judge acknowledged that an adverse inference may have been warranted, but she found it unnecessary to draw it. We

3. We agree with the judge, for the reasons she states, that the Respondent lawfully suspended Schlegel in October 2011, and issued a CAM to junior paramedic Brent Warburg for their failure to notify dispatch of their lunch stop and, subsequently, their delay in notifying dispatch of their arrival at a hospital to pick up a patient. The delay at the hospital resulted from Schlegel engaging in a conversation in the hospital parking area. His suspension is consistent with the only other comparable delay in the record, when the Respondent suspended a senior and junior paramedic for taking a 33-minute detour on a drive back from southern Oregon without notifying dispatch. Indeed, in that situation, unlike here, there is no evidence that a patient or hospital was kept waiting.

Although Warburg received lesser discipline than Schlegel, we disagree with the General Counsel that this shows unlawful disparate treatment of Schlegel. As the senior paramedic, Schlegel was responsible for the operation of the ambulance. Although the Respondent imposed the same discipline on the junior and senior paramedics who engaged in the 33-minute detour, the Respondent has imposed heavier discipline on senior paramedics than on junior paramedics when they have engaged in misconduct together. Thus, when a senior paramedic directed a junior paramedic to drive at an unsafe speed after a patient went into a crisis, the Respondent discharged the senior paramedic, but the junior paramedic was issued a CAP. Moreover, in the incident before us, it was Schlegel who further delayed the patient pickup by talking to his friend. Thus, we find that Schlegel's October 2011 suspension did not constitute an unfair labor practice.[14]

draw such an inference because the subpoenaed documents would be plainly relevant to evaluating the Respondent's claim that it treated Schlegel as it treated other employees in similar situations, and an adverse inference is warranted based on the Respondent's unexcused failure to produce them. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004) (adverse inference is permissible sanction to deal with subpoena noncompliance), enfd. 156 Fed. Appx. 386 (2d Cir. 2005); *Auto Workers v. NLRB*, 459 F.2d 1329, 1343 (D.C. Cir. 1972) (absent a valid reason for bypassing the adverse inference rule, "the inference should actually be drawn and its impact evaluated").

Member Johnson finds that the General Counsel has failed to show the judge abused discretion by failing to draw an adverse inference in the circumstances of this case. See, e.g., *Tom Rice Buick,* 334 NLRB 785, 786 (2001) ("the decision to draw an adverse inference lies within the sound discretion of the trier of fact").

[14] Schlegel's October 2011 infraction was one of the reasons the Respondent cited for discharging Schlegel, and we have found that his suspension for this incident did not constitute an unfair labor practice. However, the Respondent admitted that it fired Schlegel for *multiple* incidents, including the other disciplinary actions that were unlawful. We agree with the judge that the October 2011 incident would not have resulted in Schlegel's termination, and that Schlegel's discharge violated Sec. 8(a)(3), (4), and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

Replace the judge's Conclusions of Law 2, 4, and 5 with the following paragraphs.

"2. Teamsters Joint Council #37, International Brotherhood of Teamsters, and Teamsters Local #223, International Brotherhood of Teamsters, are labor organizations within the meaning of Section 2(5) of the Act."

"4. The Respondent violated Section 8(a)(3) and (1) of the Act by disciplining, suspending, and demoting employee Travis Schlegel in October 2010, and by disciplining employee Randy Watkins in August 2011, as set forth herein."

"5. The Respondent violated Section 8(a)(3), (4), and (1) of the Act by disciplining employee Travis Schlegel in March, July, and August 2011, and by discharging him in October 2011 as set forth herein."

ORDER

The Respondent, Metro-West Ambulance Services, Inc., Hillsboro, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing policy 701 concerning employee associations to prohibit employees from wearing pins or other insignia signifying support for a union.

(b) Engaging in surveillance of employees engaged in union activities or engaging in surveillance to discover employees' union or other protected, concerted activities.

(c) Promulgating and maintaining a rule against employees loitering or remaining on its property when not scheduled to work to discourage employees from forming, joining, or assisting the Union or engaging in other protected, concerted activities.

(d) Selectively and disparately enforcing a rule against employees loitering or remaining on its property when

Members Miscimarra and Johnson join in the finding that Schlegel's employment termination violated the Act. The record supports the judge's finding that some prior discipline of Schlegel resulted from antiunion animus, Schlegel's employment termination resulted in part from this other discipline, and the Respondent did not sustain its defense burden under *Wright Line*. As to the latter point, however, Members Miscimarra and Johnson note that Schlegel's documented past performance deficiencies could reasonably warrant employment termination**.** For example, Schlegel cut a patient's elbow while operating a gurney, he struck a curb at 40 miles per hour while transporting a patient, and he was the senior paramedic when the safety latch on a gurney failed to catch, causing a patient's head to strike the mattress when the gurney dropped 12 inches. These are legitimate reasons for discharging an employee. However, if the General Counsel satisfies his initial burden under *Wright Line,* the employer must persuade by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's protected activities. E.g., *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). In the instant case, the Respondent has failed to establish that Schlegel's performance deficiencies, standing alone, would have resulted in his discharge.

not scheduled to work by applying it only against employees engaging in union activities.

(e) Coercively interrogating employees about union activities.

(f) Threatening employees with adverse consequences for engaging in union activities.

(g) Issuing corrective action memoranda, corrective action plans, or performance improvement plans to employees, or suspending or otherwise disciplining employees for engaging in union or other protected, concerted activities or because unfair labor practice charges are filed on their behalf.

(h) Demoting employees for engaging in union or other protected, concerted activities.

(i) Discharging employees for engaging in union or other protected, concerted activities or because unfair labor practice charges are filed on their behalf.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule prohibiting employees from loitering or remaining on the Respondent's property when they are not scheduled to work.

(b) Within 14 days from the date of this Order, rescind employee Travis Schlegel's October 27, 2010 suspension; his October 29, 2010 corrective action plan and demotion; the March 7, 2011 extension of his corrective action plan; his July 11, 2011 performance improvement plan; his August 8, 2011 corrective action memorandum; and employee Randy Watkins's August 8, 2011 corrective action memorandum.

(c) Within 14 days from the date of this Order, offer Travis Schlegel full reinstatement to his field training officer position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Travis Schlegel whole for any loss of earnings and other benefits suffered as a result of his demotion, his October 27, 2010 1-day suspension, and his discharge in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate Travis Schlegel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(f) Within 14 days from the date of this Order, remove from its files the coaching memoranda issued to employees Travis Schlegel, Trish Preston, and Peter Haslett, and any other references to the unlawful prohibition against wearing union pins, and within 3 days thereafter notify Schlegel, Preston, and Haslett in writing that this has been done and that the coaching memoranda will not be used against them in any way.

(g) Within 14 days from the date of this Order, remove from its files all references to the suspension of Travis Schlegel on October 27, 2010; the issuance of a corrective action plan to Travis Schlegel on October 29, 2010; the demotion of Travis Schlegel from his field training officer position on October 29, 2010; the extension of Travis Schlegel's corrective action plan on March 7, 2011; the issuance of a performance improvement plan to Travis Schlegel on July 11, 2011; the issuance of a corrective action memorandum to Travis Schlegel on August 8, 2011; the discharge of Travis Schlegel on October 27, 2011; and the issuance of a corrective action memorandum to Randy Watkins on August 8, 2011. Within 3 days thereafter, notify Travis Schlegel and Randy Watkins in writing that this has been done and that these actions will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Hillsboro, Oregon facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 27, 2010.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enforce policy 701 concerning employee associations to prohibit you from wearing pins or other insignia signifying support for a union.

WE WILL NOT engage in surveillance of you when you are engaged in union activities or to discover your union or other protected, concerted activities.

WE WILL NOT promulgate and maintain a rule against your loitering or remaining on our property when not scheduled to work to discourage you from forming, joining, or assisting the Union or engaging in other protected, concerted activities.

WE WILL NOT selectively and disparately enforce a rule against your loitering or remaining on our property when not scheduled to work by applying it only against employees engaging in union activities.

WE WILL NOT coercively interrogate you about union activities.

WE WILL NOT threaten you with adverse consequences for engaging in union activities.

WE WILL NOT issue corrective action memoranda, corrective action plans, or performance improvement plans to you, or suspend or otherwise discipline you for engaging in union or other protected, concerted activities or because unfair labor practice charges are filed on your behalf.

WE WILL NOT demote you for engaging in union or other protected, concerted activities.

WE WILL NOT discharge you for engaging in union or other protected, concerted activities or because unfair labor practice charges are filed on your behalf.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the rule prohibiting employees from "loitering" or remaining on our property when they are not scheduled to work.

WE WILL, within 14 days from the date of the Board's Order, rescind Travis Schlegel's October 27, 2010 suspension; his October 29, 2010 corrective action plan and demotion; the March 7, 2011 extension of his corrective action plan; his July 11, 2011 performance improvement plan; his August 8, 2011 corrective action memorandum; and employee Randy Watkins's August 8, 2011 corrective action memorandum.

WE WILL, within 14 days from the date of the Board's Order, offer Travis Schlegel full reinstatement to his field training officer position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Travis Schlegel whole for any loss of earnings and other benefits suffered as a result of his October 27, 2011 discharge, less any net interim earnings, plus interest.

WE WILL make Travis Schlegel whole, with interest, for any loss of earnings and other benefits suffered as a result of his October 27, 2010 1-day suspension and his October 29, 2010 demotion from his field training officer position.

WE WILL compensate Travis Schlegel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating his backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files the coaching memoranda issued to employees Travis Schlegel, Trish Preston, and Peter Haslett and any other references to the unlawful prohibition against wearing union pins, and WE WILL, within 3 days thereafter, notify Schlegel, Preston, and Haslett in writing that this has been done and that the warnings will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the suspension of Travis Schlegel on October 27, 2010; the issu-

ance of a corrective action plan to Schlegel on October 29, 2010; the demotion of Schlegel from his field training officer position on October 29, 2010; the extension of Schlegel's corrective action plan on March 7, 2011; the issuance of a performance improvement plan to Schlegel on July 11, 2011; the issuance of a corrective action memorandum to Schlegel on August 8, 2011; the discharge of Mr. Schlegel on October 27, 2011; and the issuance of a corrective action memorandum to Randy Watkins on August 8, 2011; and WE WILL, within 3 days thereafter, notify Travis Schlegel and Randy Watkins in writing that this has been done and that these actions will not be used against them in any way.

METRO-WEST AMBULANCE SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/36–CA–010801 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Rachel Harvey, Esq., for the General Counsel.
Jennifer A. Sabovik, Esq., for the Respondent.
Mark MacPherson, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Portland, Oregon, on June 5–13, 2012. The International Brotherhood of Teamsters, Joint Council No. 37 (the Union, Teamsters. or Local 223), filed numerous charges and amended charges in the above-captioned cases on various dates between February 23, 2011, and March 19, 2012. The Acting General Counsel issued the fifth consolidated complaint on May 17, 2012. The Respondent filed a timely response denying all material allegations. At the hearing, the Acting General Counsel withdrew complaint paragraphs 7(a) and (b) and 9. (Tr. 810.).[1]

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: maintaining and enforcing a rule prohibiting employees from wearing association pins; engaging in unlawful surveillance; promulgating, maintaining, and enforcing a rule prohibiting employees from loitering or remaining on the Respondent's property when not scheduled to work; and unlawfully interrogating an employee. The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by: suspending, demoting, and issuing a corrective action plan to employee Travis Schlegel; issuing a corrective action memorandum to employee Randy Watkins; and issuing a corrective action memorandum to employee Brent Warberg. Finally, the complaint alleges that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by extending employee Travis Schlegel's corrective action plan (CAP); issuing him a performance improvement plan and corrective action memorandum; and terminating him.

On the entire record, including my observation of the witnesses' demeanor, and after considering the Acting General Counsel and the Respondent's briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Oregon corporation, with a place of business in Hillsboro, Oregon, provides emergency ground ambulance services in Washington County, and nonemergency ambulance transport services throughout the Pacific Northwest. During the past 12 months and at all material times it derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of Oregon. The Respondent admits, and I find, that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find, and it is uncontested, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background and the Respondent's Operations

The Respondent provides medical transportation in the greater Portland, Oregon area. More specifically, the Respondent provides emergency ground ambulance services in Washington County, and nonemergency ambulance transport services throughout the Pacific Northwest. (Tr. 482–483.) The Respondent also provides standby service, which is medical coverage for large special events such as Trailblazer games, concerts, and the like. In addition, it utilizes accessible vans to transport customers with restricted mobility. (Tr. 483.)

The Respondent has roughly 300 employees, including paramedics, emergency medical technicians (EMTs), vehicle service technicians (VSTs), mechanics, office personnel, and supervisors. (Tr. 46, 483.) Paramedics work in the ambulance department (sometimes referred to as "operations") which provides both emergency and nonemergency ambulance transport. (Tr. 482.) EMTs, who have less training than paramedics,

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for the Respondent's exhibit; "GC Exh." for Acting General Counsel's exhibit; "GC Br." for the Acting General Counsel's brief; and "R. Br." for the Respondent's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

work in the wheelchair department. (Tr. 482, 484.) VSTs, who also work in the wheelchair department, maintain the Respondent's vehicles by washing, fueling, and restocking them. (Tr. 608.) The Respondent's other organizational components include the business office, communications center (sometimes referred to as the dispatch center), fleet maintenance, information technology, and administration. (Tr. 483–484.)

Paramedics work in teams. Generally a senior paramedic is paired with either a junior paramedic or an EMT. The senior paramedic is responsible for the overall operations of the ambulance and for supervising the junior paramedic or EMT. (Tr. 27, 529–530; GC Exh. 11.) Selected senior paramedics also serve as field training officers (FTOs). FTOs train new employees on company policies, operation of the ambulance, interactions with coworkers, report writing, and ensure they have adequate paramedic skills.[2] FTOs serve a very important leadership role, and are charged with, inter alia, mentoring new employees and helping to create a good working environment for them. (Tr. 49, 188, 488, 573–574, 739–740; GC Exh. 12.) Trainees pair with different FTOs, with each pairing lasting around 2 months. (Tr. 744.) FTOs evaluate junior paramedics for every shift they work using the Respondent's Observation Report and Evaluation Guidelines (the Guidelines). (Tr. 743; R. Exh. 1.) The Guidelines provide a 1-to-5 rating system, with 5 being the highest score, in various competencies. (Tr. 189–197; R. Exh. 1.) Once completed, the FTO gives the evaluations to the training director. (Tr. 743–744, 759–760.) FTOs are held to the highest standard for their own performance. (Tr. 577.)

Paramedics report to the ambulance department supervisors. During the time period relevant to this complaint, the ambulance department supervisors included Kevin Riensche, Gregg James, Jan Lee, and Jeff Mathia. (Tr. 51, 862.) FTOs report to the training director, who was Jan Lee until around June 2010, when Sheri Snyder assumed the position. (Tr. 51, 735.) The training director and ambulance supervisors report to the ambulance department manager, who at all relevant times was David Weeks (Tr. 51, 932). EMTs, who operate the wheelchair vans to transport wheelchair-bound customers, report to the wheelchair department supervisors, who in turn report to the wheelchair department manager, Brian Fairbanks. The department managers, including Weeks and Fairbanks, report to the vice president of operations, Larry Boxman. (Tr. 52.) Boxman reports to J. D. Fuiten, the Respondent's owner. (Tr. 482.)

The Respondent's headquarters facility is on Dawson Creek Drive in Hillsboro, Oregon, and is often referred to as "Dawson Creek" or "the Creek." (Tr. 46.) The headquarters building contains supervisors' and managers' offices. It also houses a crew room with restrooms, lockers, vending machines, a shower, two computers, chairs, and a couch for the staff. The crew room is adjacent to the supply room. The door at the back of the crew room leads to the ambulance bay. (Tr. 432, 468–470; R. Exh. 6.) The Respondent's facility has a few different parking lots. On the south side of the building, there is a parking lot used mainly for administration and visitors, referred to herein as the admin lot. (Tr. 406.) There are three parking lots in the back of the building, referred to herein as the front, middle, and back lots. The Respondent owns the front lot, but leases the middle and back lots. (Tr. 598.) The front parking lot houses a large fuel tank to service the Respondent's vehicles. (Tr. 470; R. Exh. 6.) A mechanic's shop is located behind the fuel tank. (Tr. 472; R. Exh. 6.) Wheelchair vans park in the back and middle parking lots. (Tr. 454, 461.) In-service ambulances park in a separate side lot. If there is an overflow, ambulances occasionally park in one of the back parking lots. (Tr. 609–611.)

The Respondent's contract with Washington County requires them to be on time for emergency calls 90 percent of the time. For the majority of the county, this translates to 8 minutes and 30 seconds. (Tr. 550; R. Exhs. 7, 12.) To help meet this goal, paramedics and EMTs in the field are assigned to "posts" where they park and wait for calls. There are 20 posts strategically located to meet demand, some of which change regularly to accommodate traffic patterns and evolving need. (Tr. 551–553.) Crews posting in the field also respond to nonemergency calls. The response times for these calls vary depending on the individual contract. When posts change, the Respondent notifies employees by email and pager. The posts are technically intersections. According to Boxman and Snyder, crews may park within .2 miles of the intersection. (Tr. 554–557, 746; R. Exh. 7.) Crews are not permitted to post farther than .2 miles from the assigned post because that could negatively impact response times, resulting in a higher likelihood a patient will die. (Tr. 569.) Snyder trained the FTOs to post within .2 miles of the designated intersection in order to ensure appropriate response times. (Tr. 746–747.)

The Respondent uses a computer aided dispatch (CAD) system that color codes ambulances to determine their availability. Green means the ambulance is available and is either at post or en route to post. Yellow means the ambulance has been assigned to a call but the crewmembers are not actively involved with it yet. Red means the ambulance is out of service. When a crew arrives at a post, they notify dispatch. (Tr. 566–567.) When a call for service comes in, the CAD records the time the Respondent receives the call, the time the ambulance is dispatched, the time the ambulance goes on route, the time it arrives at the caller's destination, the time it clears the caller's destination and proceeds to the hospital, the time it arrives at the hospital, and the time it clears the hospital and is dispatched to a post or another assignment.[3] The paramedics and EMTs are expected to call and notify dispatch when each of these events occurs. In addition, they are to contact dispatch if they need supplies, the ambulance has mechanical failures, or if they want to take a break to use the restroom or get something to eat. (Tr. 748–749.)

Dispatch determines which ambulance to send to an emergency call by looking at the Respondent's automatic vehicle location (AVL) system which shows, in basic terms, where the ambulances are, whether or not they are available, and any traffic impediments. (Tr. 558–560.) Response times for emer-

[2] A separate category of employee, referred to as a preceptor, trains students solely on the clinical component of the paramedic field. (Tr. 488.)

[3] The CAD also includes other data such as the patient's condition and location. (Tr. 665.)

gency calls will sometimes be adjusted for unforeseen traffic delays. For nonemergency calls, estimated time of arrival may also be similarly adjusted if there is traffic or if the crew calls in and requests a break for food. (Tr. 562–563.) If an available vehicle is posted, the dispatchers determine which ambulance to send to nonemergency calls by looking at the posting plan in the CAD system. (Tr. 565.) The AVL system is not used to confirm placement of an ambulance after the crew notified dispatch that they have arrived at their assigned post. (Tr. 567–568.)

For every emergency call, the State of Oregon requires paramedics to complete an emergency medical services (EMS) report describing the transport or the patient's refusal of transport. (Tr. 513.) The attending paramedic fills out the EMS report, which is an electric form. Once filled out, the form is electronically sent to the Respondent's server and, where relevant, to the hospital where the patient was transported. Both crewmembers are expected to review the report. (Tr. 534–535, 537–538.) The Respondent also uses internal incident reports, sometimes referred to as communications reports, for employees to report anything unusual that may have occurred on a transport or a refusal. (Tr. 513–514.) In addition, employees are expected to notify the supervisor and the attending physician when they arrive at the hospital of any unusual occurrences. (Tr. 536.)

B. Beginning of the Union Campaign

Mark MacPherson was the lead organizer for Local 223's campaign to organize Metro-West employees. (Tr. 35.) He first met with Metro-West employees on July 28, 2010. (Tr. 36.) MacPherson talked to former employees to determine who would be a persuasive union advocate, and although he was not at the July 28 meeting, Travis Schlegel's name came up from the beginning. (Tr. 37.)

C. The Respondent Begins Just Culture Progam

As Metro-West grew, Boxman noticed some problems, including a communications gap between management and employees. (Tr. 491–492.) His response was to implement a program called Just Culture and a High Reliability Organization (Just Culture). Boxman learned about Just Culture from Paul LeSage, who implemented it successfully as the assistant chief at Tualatin Valley Fire and Rescue. (Tr. 490.) Boxman and LeSage met in July 2010 to discuss Just Culture. Boxman learned that LeSage was planning to retire and start a consulting business implementing Just Culture at different organizations. LeSage retired in September 2010, and he and Boxman began designing the implementation process for Just Culture at Metro-West in October. (Tr. 493.) Training for supervisors began in October. (Tr. 494.)

Just Culture changed the way the Respondent implements discipline. Before, Metro-West utilized a traditional progressive discipline system. Under Just Culture, actions that can lead to discipline are considered either behavior-based or performance-based. As Boxman explained, an employee who is having trouble initiating an intravenous (I.V.) line has a performance problem, but an employee who gets in an accident while texting has made a behavioral choice. If the infraction is the result of a behavioral choice rather than a performance deficiency or systemic problem, employees are provided with corrective actions to enable them to address the problem and learn from it. Minor incidents result in corrective actions memoranda (CAM), and if not addressed can progress to a corrective action plan (CAP). A more serious infraction may result in a CAP in the first instance. Performance deficiencies, which pertain to skill as opposed to behavior, result in a coaching memorandum for minor problems. More serious or repetitive problems are addressed through a performance improvement plan (PIP). Failure to follow either a CAP or a PIP can result in termination. (Tr. 501–510; R. Exhs. 7, 8.)

Under Just Culture, when an event occurs, the parties involved perform a "root cause analysis." This involves getting the parties together to break down the details of the event to identify why it may have occurred, and helps the Respondent determine whether human errors or systems errors need to be addressed. (Tr. 496, 785–786.)

Schlegel worked for Metro-West from October 1997 until his termination on October 27, 2011. (Tr. 44.) He started as a junior paramedic. After about 4–5 years he was promoted to senior paramedic. In 2009, Schlegel became an FTO. (Tr. 46–49.)

Several years ago, two patients complained about Schlegel, but he was not disciplined. (Tr. 120–123.) On May 21, 2009, Schlegel filled out a communications report to advise his supervisor about a negative interaction with a member of the public. Schlegel and his partner had stopped to ask an apparently homeless man who was rubbing his belly and pointing at the ambulance if he needed assistance. The man responded something to the effect of, "It's not healthy being so damned fat." Schlegel replied, "Fuck you." After he cooled down, he informed his partner that he had used bad judgment, apologized for his overreaction, and promised it would not happen again. Schlegel was not disciplined for this incident. (R. Exh. 25, pp. 1–2.)

On June 8, 2010, Schlegel filled out an incident report stating that while raising the gurney, he had scraped a patient's elbow. He dressed the wound and placed a bandaid on it, and informed the family of the incident. (Tr. 148; GC Exh. 32.) He also submitted an incident report to his supervisor. (Tr. 885.) There is no record evidence of a complaint regarding this incident, and Schlegel was not disciplined for it.

Paramedics complete paperwork after their shifts. On October 8, 2010, Weeks sent an email to Schlegel, copied to Schneider, stating that Metro-West allows 30 minutes to complete a chart, and that Schlegel was compensated 60 minutes for two charts he completed. On October 11, Schlegel responded that he would adhere to this rule and close the charts after 30 minutes. He requested a copy of a time adjustment form and asked if he had worked more than an hour but had only been compensated for an hour. (GC Exh. 15.) On October 9, James sent out an email forwarding a 5-page operations update newsletter to the employees. The second page reminds employees of the importance of checking their emails. The pertinent part of the message starts out by stating, "Unfortunately, if you don't check your email you won't see this, but your supervisors are

reminding everyone of the importance of logging in and reading email regularly." Schlegel sent a response to James on October 11, suggesting that a central board where bulletins could be posted "would be nice" and asking where on the time adjustment form employees should indicate the time spent reading emails. (R. Exh. 3; Tr. 210–211.) In Schlegel's view, checking emails could be time consuming, and he was asking where to adjust his time because employees often checked emails off the clock. (Tr. 211.) Snyder recalled speaking to Schlegel about this email, but could not recall the exact date. She told him that the supervisors perceived it as being a smart aleck. Schlegel said he would apologize to the supervisors. (Tr. 756–758.)

Schlegel received a letter of counseling on October 13, 2010, for excessive tardiness. Specifically, he was late five times within a 90-day period. Per the employee handbook in effect at the time, excessive tardiness was defined as three episodes of tardiness in a 90-day period. The counseling warned that further infractions of the excessive tardiness policy would result in a letter of reprimand.[4] (GC Exh. 16; Tr. 73.)

Snyder, who had been a personal friend of Schlegel for over 12 years, noticed a change in his behavior starting in the spring of 2010. He had told her that he was going through a divorce, had filed for bankruptcy, and his girlfriend was pregnant. (Tr. 765–768.)

1. The bariatric gurney and Schlegel's October 2010 discipline

The Respondent's paramedics utilize two types of stretchers or gurneys: standard and bariatric. The bariatric gurney is wider than the standard gurney, and is designed to carry more weight. (Tr. 53.) Seventeen of the standard gurneys are powered with a hydraulic system that lifts and lowers the patient, and some are unpowered.[5] (Tr. 54, 544.) There is one bariatric gurney, and it is unpowered. (Tr. 54.)

According to Schlegel, when paramedics were dispatched to a call where the patient would require the bariatric gurney, they would traditionally complete the transport and then return it back to Dawson Creek and retrieve the standard gurney. (Tr. 55.) Schlegel believed that it was not safe to use the bariatric gurney on a normal-sized patient because of its larger size and the inability to strap a patient in as securely. (Tr. 55–56.) Other employees also complained about routine use of the bariatric gurney, both because of the perceived safety issue for the patient, and because it is heavier and harder for the employee to manipulate. (Tr. 56, 544–545.) Boxman recalled that employees voiced concerns to the supervisors about using the bariatric gurney. (Tr. 664–665.) Riensche was also aware that employees did not like using the bariatric gurney and noted confusion among the crews and supervisors about when it should be used. (R. Exh. 28.)

On October 25, 2010, Schlegel was working with Trevor Olsen, a junior paramedic trainee. (Tr. 56, 316–317.) At around noon, they were dispatched to transport a bariatric patient. After they completed the transport, they were advised to go to a post and wait for a 9-1-1 call. Schlegel advised dispatch that he had the bariatric stretcher, and asked to return it and swap it out for a standard gurney. Dispatch told Schlegel to go ahead and post with the bariatric gurney. (Tr. 57, 342.) Schlegel called the on-duty supervisor, Melissa Zimmer, who likewise told him to go ahead and post even though he had the bariatric gurney. (Tr. 57, 318, 343.) Schlegel informed Olsen that Zimmer had told him, "That's the way we are doing it and that's the way we've been doing it." Schlegel and Olsen used the bariatric gurney for the calls they received that afternoon, even though the patients did not require it. (Tr. 58.) They picked up a 60–65-year-old woman who weighed around 100–110 pounds.[6] (Tr. 319.) Olsen saw Schlegel pushing the woman back to the center of the stretcher when they arrived at the hospital, and Schlegel stated that this was why they shouldn't use bariatric stretchers for regular sized patients. (Tr. 320.) When Schlegel returned to headquarters at the end of his shift, he talked to Supervisor Gregg James.[7] Schlegel told James he was a little upset because he had to use the bariatric stretcher, and James agreed that the paramedics are not supposed to post for 9-1-1 calls with it. Schlegel asked James to speak with Zimmer about the issue, and James said that he would. (Tr. 58–59.)

Olsen agreed that using the bariatric stretcher for a regular sized patient posed a risk to the patient, for which the crew could ultimately be held responsible. (Tr. 321, 344.) Olsen also believed the bariatric stretchers posed a lifting hazard for the paramedics because they must manually lift very heavy patients. (Tr. 354.) Boxman disagreed that the bariatric stretcher is harder to lift, noting it has the additional equipment of ramps and a winch. (Tr. 544.) Boxman believes the bariatric stretcher is safe for all patients, and the paramedics are trained on how to make sure the patient is secure if the straps are not tight enough. According to Boxman, reviews by Occupational Safety and Health Administration (OSHA) and the Commission of Accreditation of Ambulance Services (CAAS) have approved use of the bariatric stretcher for all patients. (Tr. 540–542.)

On October 27, 2010, Schlegel worked with Olsen again. When they were checking the ambulance before leaving that morning, Schlegel asked Riensche about the policy regarding posting for 9-1-1 calls with the bariatric stretcher. Riensche

[4] The provision from the employee manual that was submitted at the hearing defines habitual tardiness as being late more than two times in a 180-day period. This provision was effective November 1, 2010, and the provision that was in effect at the time of the letter of counseling and the subsequent CAP discussed below is not in evidence. (GC Exh. 7, pp. 5–6.)

[5] There is clearly a misunderstanding in the testimony at pp. 542–543. The Respondent's counsel asked whether Metro-West has any hydraulic or powered bariatric gurneys, to which Boxman responded, "Yes, we have seventeen powered gurneys." Boxman and other witnesses, however, testified that there is only one bariatric gurney. His response therefore makes no sense, and I infer and find he was referring to regular gurneys.

[6] Olsen's testimony is that this occurred on October 27, but it is clear from later testimony, his affidavit, and other witness testimony that the date was October 25. Schlegel never made it out to the field on October 27.

[7] James does not work for the Respondent anymore and did not testify. (Tr. 817.)

said he would find out, and when he returned he informed Schlegel and Olsen that they were supposed to post with the bariatric stretcher. (Tr. 60, 867–868.) Schlegel replied, "Geeze Kevin, are they trying to get a union out here?" or words to that effect. (Tr. 60, 868.) At the time, Schlegel had heard nothing more than rumors about a campaign to organize Metro-West's employees. (Tr. 61.) Schlegel described his tone of voice as, "Almost jokingly. Very low key," and agreed the remark was somewhat sarcastic. (Tr. 61, 204.) Olsen described Schlegel's tone of voice as "normal" and did not perceive Schlegel as sounding angry or disrespectful. (Tr. 325.) Riensche described Schlegel's tone as "annoyed." (Tr. 868.) As Riensche started to leave, Schlegel stated, "Love ya" or "love you buddy." (Tr. 201, 325, 868.) Olsen perceived the comment as "pretty joking." (Tr. 325.) The Respondent argues in its brief that Schlegel made a "finger gun" at Riensche but this is unsupported. Riensche testified Schlegel did a "finger pointing" and that he felt Schlegel was being flippant and unprofessional in front of his trainee. (Tr. 869.)

Shortly after this exchange, Riensche spoke with Snyder about it.[8] (Tr. 750, 870.) Riensche conveyed that he believed Schlegel's comment was unprofessional in front of a trainee. Snyder and Riensche talked with Weeks about the interaction, and Snyder opined that she did not believe Schlegel acted professionally. (Tr. 751–752.) Weeks perceived Schlegel as clearly upset and not in the frame of mind to train people. Weeks and Snyder decided to suspend Schlegel for the day. (Tr. 62, 208, 934–935.) They talked about Schlegel's recent disciplinary action for tardiness and identified that this was not the first time he showed a disrespectful attitude. (Tr. 935.) Snyder testified that she found his behavior that day was "alarming" and stated the "accumulation of all of it was just alarming to me." She referred back to incidents involving a wrinkled uniform 6 to 8 weeks prior, a letter of counseling for tardiness, an email perceived as sarcastic, not showing up for the prior two FTO meetings, and not filling out observation reports correctly. (Tr. 754–761.)

Snyder and Weeks instructed dispatch to tell Schlegel to return to Dawson Creek. (Tr. 752, 871.) When Schlegel received the call, he and Olsen speculated that he was in trouble for saying the "U" word. Riensche and Weeks led Schlegel into Snyder's office Riensche told Schlegel he thought his comment was unprofessional. According to Schlegel, Weeks, whom Schlegel perceived as agitated, stated, "You need to consider your next words very carefully." Schlegel made a comment about the Respondent's ability to purchase wood paneling for a remodel but not the proper size stretchers. Schlegel was then told of his suspension. (Tr. 62, 933–934.)

Schlegel returned on October 28 and worked his shift. As he was leaving, Snyder advised him to meet with her and Weeks the following day. Though he was not scheduled to work, Schlegel met with Weeks and Snyder on October 29. (Tr. 52, 763, 935–936.) According to Schlegel, upon inquiry regarding what he said that was wrong, Weeks responded, "union. You said union"; and Snyder responded, "Yeah, Trav, why would you say that knowing the history of unionization at Metro West?" (Tr. 65.) Weeks denied making any such comment, and stated he told Schlegel it was not what he said, but the manner in which he said it. (Tr. 937.) Snyder recalled saying something like, "Travis, why did you say that? You know how they feel around here about that." Snyder stated it was no secret that most FTOs and long-term employees know that the Respondent does not feel a union would be a good fit with the Company, and she recounted an attempt to organize years ago. (Tr. 769–770.) Olsen, a new employee, had heard from coworkers and Supervisor Lee that Metro-West was antiunion. (Tr. 352.)

Snyder told Schlegel that because of his behaviors, she thought he should step down as FTO. According to Snyder, Schlegel became very angry, stated they were messing with his livelihood three times, screaming in her face. Snyder left the room and returned after a few minutes. (Tr. 764.) Weeks recalled that Snyder became upset with some comments made to her about her not supporting him, but he did not specifically recall the comments. (Tr. 937.) Weeks concluded the meeting by telling Schlegel he would be put on a corrective action plan (CAP).

The CAP, dated November 8 and signed by Weeks and Schlegel November 11, 2010, referenced the "derogatory comments" Schlegel made to Riensche on October 27, as well as the previous writeup for excessive tardiness and the October 11 email regarding charting.[9] (Tr. 52, 65; GC Exh. 13.) The CAP also instructed Schlegel to attend the employee assistance program (EAP), and to check in with his supervisor twice a month to receive feedback on his progress. Schlegel signed the CAP on November 11, 2010. In the section for employee input/rebuttal Schlegel wrote, "I agree that regardless of the nature of the comments, the time and manner in which they were stated could have been handled more professional and will do so in the future." Schlegel made this comment because he feared for his job. (Tr. 66–67; GC Exh. 13.) In the section for describing the performance concerns, Weeks wrote that Schlegel had been exhibiting a series of behaviors that have led to an unprofessional interaction with a supervisor, and gave as examples excessive tardiness and increasing irritation with his work environment. (GC Exh. 14; Tr. 938.) Schlegel did not receive a copy of the CAP until March 7, 2011. (Tr. 98–99, 118; GC Exh. 13.)

Schlegel was demoted from his FTO position, and reverted back to senior paramedic status. Weeks was Schlegel's interim

[8] Snyder recalled the date as October 26 (Tr. 750), but this was clearly incorrect.

[9] Riensche testified that he included the Schlegel's email regarding an operations update about the Respondent's requirement that employees check their email, because it was referenced in the CAP. (Tr. 783; R. Exhs. 3, 25, p. 3.) (I note that R. Exh. 25, p. 3 is an incomplete duplicate of R. Exh. 3.) Weeks agreed this was the email the CAP addressed. (Tr. 941.) The CAP, however, references an email regarding charting, and R. Exh. 3 does not address charting. GC Exh. 15 is in fact an email Schlegel sent about charting on the same day, October 11. According to Weeks, the email about charting was not specifically addressed in the CAP, but was another example of the behavior Schlegel was exhibiting. (Tr. 942.) The Respondent's brief asserts that the CAP addresses both emails, but the plain language of the CAP shows this to be inaccurate. (GC Exh. 13.)

supervisor for a couple of weeks, after which time Schlegel reported to Riensche. (Tr. 52, 865.) Riensche asked Schlegel if he would have any problems having him as a supervisor given his involvement with the incident that ultimately led to Schlegel's demotion, and Schlegel replied that he would not. (Tr. 75, 86.)

2. Schlegel's early involvement with the Union

The Union represents paramedics who work for American Medical Response (AMR), one of Metro-West's competitors. After his suspension and demotion, Schlegel called a friend from AMR, who in turn put him in touch with Frank Hiltebrand, an AMR paramedic and representative of Local 223. (Tr. 76.) Schlegel and Hiltebrand spoke on October 29, 2010. Schlegel attended a union organizing meeting on November 23, and was active in the organizing campaign from that point forward. (Tr. 77.) He set up a Facebook page in January 2011, under the name MWA Medicguy, to provide a forum for employees to discuss the Union, and he spoke to employees at work and after work.[10] (Tr. 77–78; GC Exh. 18.) At first, Schlegel did not identify himself on the Facebook page, but he revealed his identity on February 25, 2011. (Tr. 82; GC Exhs. 22, 18, p. 127.) Boxman learned of the Facebook page from employees, but could not recall when. (Tr. 660–661.) Riensche testified that the Facebook page was common knowledge. (Tr. 924.) It is clear from the testimony of several witnesses that Schlegel was the employee most active in trying to organize the Respondent's facility on behalf of the Union. (Tr. 260, 281, 328, 360–361, 405.)

D. Introduction of Just Culture to Employees

On December 10, 2010, Boxman sent a letter to employees that set forth the challenges Metro-West had faced in recent years and the resultant "disconnect" between management and front-line employees. To bridge the gap, Boxman stated it was adopting the principles of Just Culture. He attached information about Just Culture, which stresses learning, openness and fairness, safe systems, and risk management, from a "bottom-up, top down" approach.[11] (Tr. 490–492; GC Exh. 8.) The Respondent began holding "Just Culture" meetings in January 2011. (Tr. 355, 493; R. Exh. 8.) After one such meeting, paramedic Olsen told Lee he was concerned about what would happen to his job if the employees were represented by a union, and Lee responded, "If the union comes in, you probably might not even have a job." (Tr. 352–353.)

E. Schlegel's Discipline and Union Activity January to April 2011

Boxman became aware of the Union's attempts to organize in early January 2011. (Tr. 527.) Around that same time, Schlegel and Boxman had a conversation about Schlegel's demotion. At Boxman's invitation, Schlegel agreed to attend a supervisor's meeting to address his concerns about it.[12] The supervisors meet each Tuesday, and as part of Just Culture, these meeting were opened up to employees. (Tr. 94, 621–622.) On January 18, Schlegel attended the meeting with Supervisors/Managers Weeks, Snyder, Lee, Riensche, and Supervisor-in-Training Mathia. Supervisor James likewise attended and took notes. (Tr. 817–818; R. Exh. 24.) A few senior paramedics were also present. (Tr. 94.) Schlegel discussed his frustration about the conflicting information he received regarding the bariatric gurney, which led to the interaction with Riensche, which, in turn, led to his demotion. (Tr. 624.) He further shared his opinion that the use of the word "Union" was what led to his discipline. Snyder said it was his "actual explosion as a supervisor" and unprofessional conduct in front of a trainee, and then cited a variety of other reasons, enumerated above, for Schlegel's demotion. (Tr. 625, 771.) There are various different accounts regarding whether, at the close of the meeting, Schlegel stated he wanted to work through some issues with his personal life before he returned as FTO. (Tr. 626, 773, 816, 1013; R. Exh. 24.)

In January 2011, Schlegel and Lai Wah Chan, a junior paramedic, responded to a 9-1-1 call from a patient with an altered mental status. When they arrived at the patient's residence, she looked very ill. Schlegel took the patient's blood pressure, which was extremely low, indicating potential shock or internal bleeding, and told her she needed an I.V. and transport to a hospital. Chan also noted that the patient had very low blood pressure and she was very pale. The patient was extremely concerned about the financial consequences of riding the ambulance and was very resistant. Chan and Schlegel attempted to convince her to go to the hospital. Schlegel told the patient and her family that she could die without medical attention. Schlegel asked her why she called 9-1-1 and she responded that her back pain was so severe she had passed out. Schlegel tried to impress upon her that if she was concerned enough to call 9-1-1, she needed to go to the hospital. At one point, Chan put the refusal forms in front of the patient for her to sign, and when she hesitated, Chan again tried to convince her to go to the hospital. Chan explained the potential dangers of a family member trying to drive her to the hospital. Schlegel ultimately convinced the patient to go to the hospital, and described his tone of voice as "very firm." The patient eventually walked over to the gurney and allowed Schlegel and Chan to transport her to the hospital. (Tr. 99–108, 221, 364–365, 388–389.) Chan recalls that she was the one who "made the speech" to the patient. She perceived Schlegel's tone of voice as professional during the interactions. (Tr. 365.) Schlegel called the field supervisor and notified him about the incident, stating that the patient did not want to pay the bill, and warning that there might be an issue when the bill arrived. (Tr. 368, 393.)

Chan received training from three FTOs. As part of that training she learned to use any means possible to convince a

[10] Danyel Fosdick (Dani), a coworker, ran a Facebook page called Medicgal, which was an antiunion counterpoint to the Medicguy site. (Tr. 87.)

[11] The transcript erroneously recorded the word "top" as "to."

[12] Boxman took care to state this was not a root cause analysis meeting. Schlegel thought that it was, and Zimmer's testimony and James' notes also refer to root cause analysis or "RCA." (Tr. 814–815; R. Exh. 24.) Zimmer stated that after this meeting, LeSage instructed them on how to process RCAs better. (Tr. 822.)

patient whose health is in danger to go to the hospital. (Tr. 367; GC Exh. 26.)

In late January or early February 2011, the patient called and complained, stating that the medics on the scene were very rude to her. Zimmer answered the call in the supervisors' office.[13] (Tr. 822.) The patient stated that Schlegel "instilled the fear of death" in her mother, and made her mother and 14-year-old son cry. She expressed her concern that Schlegel "made her go" to the hospital. She also reported that Schlegel asked her why she called them if she didn't want to go to the hospital. (GC Exh. 31.) Zimmer made notes of the call to her file and to the CAD. Zimmer recalled talking to the crew in the parking lot right after the call, and then turning the matter over to Riensche. Zimmer recalled speaking to Chan first, asking her to write up an incident report, and then speaking to Schlegel and asking him to write up an incident report. (Tr. 823–825.) Schlegel recalled that he prepared an incident report at Riensche's request 3 days later. (Tr. 111; GC Exh. 28.) Chan turned in an incident report dated February 2, 2011. (Tr. 369; GC Exh. 43.) Zimmer recalled that she turned Chan's report in at the end of her shift to the on-duty supervisor, but she did not know who the supervisor was. (Tr. 824–825.)

Zimmer turned the complaint information over to Riensche. She apologized to the patient and told her Metro-West would write off her bill. (Tr. 827.) On February 9, "Heather V" noted receiving an email from "Meiissa" stating that the account had been written off. (GC Exh. 31.)

In February 2011, the same day the Respondent held a Just Culture meeting, Schlegel and about four–five other employees participated in a picket on the sidewalk in front of the Respondent's entrance. Schlegel also posted prounion flyers on his locker in the crew room. (Tr. 78–79.) The Union filed its first charge on Schlegel's behalf on February 23, 2011.

On March 4, 2011, Fuiten and Boxman addressed a letter to Schlegel, but sent it to all employees. (Tr. 659.) The letter referenced meetings, pamphlets, Facebook communications, and other forms of contact being used to encourage employees to unionize. The letter then stated that some contacts have attempted to harm the reputation of the Company by containing misinformation, the most recent example being unfair labor practice charges filed with the NLRB.[14] (GC Exh. 23.)

Riensche met with Schlegel and issued him a CAP on March 7, 2011. (GC Exh. 24.) Riensche stated that the delay between the incident and the discipline occurred because he consulted with LeSage before he issued the CAP, and then he had to wait until he and Schlegel worked the same shift. (Tr. 876–877.) The CAP was based on the complaint from the patient he and Chan transported. Lee and Riensche showed Schlegel the computer aided dispatch (CAD) notes that Zimmer had taken of the phone call with the patient, and informed him that Metro-West had waived her bill. (Tr. 97–98, 114, 873–874; GC Exh. 31.) The CAP also referenced the previous CAP, noting that he was disciplined for multiple incidents of poor communication skills. In addition, it noted that he had not checked in with his supervisor twice a month, which was a requirement of the previous CAP. (Tr. 97–98; GC Exh. 24.) Schlegel said that since he did not have a copy of the earlier CAP, he did not specifically comply with the provision to check in with his supervisor, but noted that he spoke with Riensche every time he saw him when reporting to work. (Tr. 119.) Riensche gave Schlegel a copy of the previous CAP at the March 7 meeting. (Tr. 877; GC Exh. 24; R. Exh. 25, p. 13.) Riensche did not interview Chan about the incident and she received no discipline. (Tr. 369–370.) Chan did not believe she and Schlegel handled this situation differently from other similar incidents involving refusal of transport. (Tr. 370.)

On March 31, 2011, Schlegel again worked with Chan. While they were unloading a patient after transporting him to a nursing home, the safety latch at the head of the gurney where Chan was working did not catch.[15] The ambulance was parked on uneven ground, which, according to Chan, can sometimes result in the safety latch not catching. As a result, the head of the gurney fell about 12 inches as it was coming out of the back of the ambulance. The patient's pillow fell and his head hit the mattress. (Tr. 144-145, 372, 380; GC Exh. 44.) Chan and Schlegel assessed the patient for injuries, and he said he did not have any. (Tr. 372; R. Exh. 25, pp. 16–17.) They took the patient into the nursing home. According to Schlegel, he instructed Chan to inform the on-duty nurse about the incident. Schlegel informed Zimmer of the incident. (Tr. 146–147, 381, 827.) Gina,[16] the transportation coordinator at the care facility where the patient was dropped off, later called Zimmer and wanted to know about the incident. She asked why the crew did not report it when they dropped off the patient. Zimmer followed up with the crew, and Chan told her what had occurred. Zimmer called the facility back and explained what had happened. Zimmer explained that the patient did not sustain a head injury, and informed the facility to take him off the hit injury watch list. (Tr. 828–829.) Gina told Zimmer that the patient did not want to speak with anyone at Metro-West, and added that he is normally grumpy. Gina requested an incident report, and Chan and Schlegel each completed one.[17] (Tr. 830; R. Exh. 25, pp. 15–17; GC Exh. 44.) Zimmer and Mathia examined the ambulance and determined the latch was functioning properly. (Tr. 829.) Zimmer forwarded her notes about the incident to Riensche. (Tr. 830, 843.)

In April 2011, Schlegel again worked with Chan. They were called to transport a patient from a care facility where she was residing following hip replacement surgery to the hospital. The

[13] Zimmer has answered hundreds of patient complaint calls. (Tr. 822.) Riensche recalled January 24 as the date of the incident, not the date of the call. (Tr. 875–876.) Zimmer, who actually took the phone call, testified it was on January 24. In any event, the phone call occurred no later than February 2, the date Chan wrote her report.

[14] The Respondent's managers sent several like communications throughout the union organizing campaign. (GC Exh. 53 (p. 8 was not sent); R. Exhs. 9, 10, 17, 19.)

[15] Chan could not recall whether she or Schlegel was at the head of the Gurney. (Tr. 380.) Because Schlegel's testimony is more certain and is not contested, I credit it.

[16] Gina's last name is not identified.

[17] Chan's report bears the date of the incident, March 31, 2011. Schlegel's is dated April 25, 2011, with a notation that he believed he also wrote an "IR" at the time. (R. Exh. 25, p. 19.)

staff at the care facility noticed that the patient had become increasingly lethargic, was slurring her speech, and was slow to answer questions. The patient had also noticed a bright red clot in her stool. At 8:30 a.m., Chan assessed the patient prior to transport. She noted left hip discomfort from the recent surgery, and noted that the patient was very lethargic, her voice was almost a whisper, and her eyes were closed most of the time. (GC Exh. 34.)

While transporting the patient, Schlegel, who was driving, hit a curb as he was merging onto a highway. The patient was in the gurney and was strapped down. Schlegel believed his wheel hit a rut with some water in it, and stated there was a "sharp jolt." (Tr. 135–136.) Chan recalled that it was raining. (Tr. 383.) Chan stated that both she and the patient were okay. (Tr. 135–136.) After several minutes, the patient complained of pain in her left hip, but was unsure whether it was from the curb strike or the "normal bouncing around in the back" from the ambulance. Chan did not inform Schlegel of this complaint.[18] (GC Exh. 34; Tr. 229.) Schlegel and Chan arrived at the hospital, reported what had happened to the ER nurse, and turned over care. (Tr. 136.) The patient's husband had been following, so Schlegel explained to him what had happened and advised him to call the supervisor with any questions or concerns. (Tr. 137.) Schlegel called the on-duty supervisor, Brian Roth, and advised him of the incident. He told Roth that he had struck a curb and that the whole ambulance was jarred from the impact. He said that the patient did not complain at the time, but he thought the family might call and complain. (Tr. 137; R. Exh. 25, p. 26.) Schlegel also filled out an incident report. (GC Exh. 33.) Chan, the attending paramedic, promptly completed the EMS report after the call. (Tr. 384, 533–534; GC Exh. 34.) EMS reports are uploaded on the Respondent's server and are forwarded to the emergency department where the patient was transported. (Tr. 140, 534–535.) Chan was not interviewed about the incident. (Tr. 376.)

F. Rule Prohibiting Pins

Paramedics wear black uniform pants, a white shirt with company patches, and a name badge. (Tr. 123.) Schlegel wore many different pins on his uniform, including an American flag, a life flight pin, EMT medical symbols, and a Teamsters pin. (Tr. 123.) The Teamsters pin is roughly the size of a quarter. (GC Exh. 29.).

Employees also have worn stork pins, which the Respondent gives when they deliver babies in the field, as well as school pins and religious pins. (Tr. 123, 128.) In addition, employees have worn Star of Life pins, breast cancer awareness pins, and guardian angel pins. (Tr. 262.)

On April 14, 2011, James told Schlegel to come to the supervisors' office, where Zimmer was also present. James informed Schlegel that Boxman wanted him and some others, including Trish Preston and Peter Haslett, to remove their Teamsters pins. (Tr. 125–126.) James referenced policy 701, which states in full:

> The policy of the company is to not endorse, encourage or promote the formation of employee associations. This is not to be confused with professional associations (e.g. NAEMT, OAA, AAA, etc.).

(GC Exh. 30; Tr. 126.) At the time, James was wearing a Star of Life pin and an Oregon Health & Sciences University (OHSU) pin on his collar. Later that day, Schlegel noticed that James had removed his OHSU pin. He commented that James' collar looked a little light, and James responded that it was a brand new $70 pin that was now in his pocket forever. (Tr. 127.) Preston was also called into a meeting with Haslett, James, and Boxman, where she was told to remove her Teamsters pin and her guardian angel pin. (Tr. 267.)

According to Boxman, he first told employees they could not wear antiunion pins, which were round pins with a red slash indicating no union, stating:

> We had many employees coming in. And they had a pin that said, "union," on it. It was a circular pin. And it had a red line through it. And so, indicating no union. And they were wanting to wear those. And it became like, "no, you can't." And then their complaint was, "well, people are wearing pins that indicate the teamsters." And so this became—there was a lot of scuttlebutt, I guess you could say, around it. It was like boy, we need to look into this. And so, because there was so much controversy over it, we looked at our policy manual. And we had a policy. I believe it was policy 701. And we just decided to basically apply that policy to this particular circumstance and say, "we're just going to stick with that policy, so only pins that are of professional organizations associated with our company." And so we asked we the people who asked if they could wear the pin that had the red line through it, we said no.
>
> And then we started getting other complaints about the other pins that are being worn. And so we had asked them to take those pins off. And then we had one individual who was wearing that pin through his Metro West patch, wearing the teamster pin through his Metro West patch, which created a lot of controversy. And so that had to be addressed as well.

[Tr. 580.]

Since mid-April, Employees are permitted to wear pins in accordance with policy. (GC Exh. 6.) Preston wears a CAAS accreditation pin and a years-of-service pin. (Tr. 274.)

G. Recommended Terminations and Other Events Before Schlegel's May 2011 FMLA Leave

Boxman is the only person, other than Fuiten, with authority to terminate employees. (Tr. 627.) Termination actions begin with a recommendation from the supervisor to the department manager. The department manager either agrees or disagrees with the recommendation, and then forwards it to Boxman. (Tr. 627.)

On April 28, 2011, Weeks sent Boxman a letter recommending Schlegel's termination. He noted that Schlegel had a 91-percent attendance rate between March 1, 2010, and April 31,

[18] The complaint of hip pain appears on an EMS report. The paramedics electronically sign these reports at the beginning of their shifts. (Tr. 229.) Chan could not recall whether she told Schlegel about the patient's hip pain complaint. (Tr. 387.) Because Schlegel's testimony is more certain and is not contested, I credit it.

2011. Weeks also noted Schlegel's demotion for unprofessional behavior and his discipline for excessive tardiness. He further conveyed that although Schlegel had received two CAPs, Weeks continued to receive complaints from customers about his behavior.[19] Weeks concluded by stating that he and Schlegel's supervisor, Riensche, had taken steps to help Schlegel improve, but Schlegel had not shown improvement in either his performance or attitude. (R. Exh. 25, p. 24; Tr. 944–947.)

On May 5, 2011, Lee received a call from the husband of the patient with the recent hip replacement, complaining about the curb strike, and stating that his wife had been having back pain since the incident. (R. Exh. 25, p. 25.) Lee asked Schlegel to write an accident report. (Tr. 140–141; R. Exh. 25, p. 25; GC Exh. 35.)

On May 11, 2011, Riensche made a note to file memorializing a meeting he had with Schlegel, with Lee also present, about his attendance. Riensche did not recall whether he made the note the day of the meeting or the day after. (Tr. 880; R. Exh. 25, p. 27.) According to Riensche's notes, he met with Schlegel to inform him that his attendance percentage was 91 percent for the time period of April 2010 through March 2011, which constitutes habitual absenteeism under the Respondent's policy. Schlegel commented that the Respondent was finding a lot of reasons to discipline him lately, asked about the recent claim of injury by a patient (which Riensche noted was still under investigation) and asked if Riensche was aware of what was going on with the NLRB. Some other conversation took place, and the meeting concluded by Schlegel asking for the information showing his attendance, and Riensche agreeing to provide it.

On May 16, 2011, Riensche wrote an unaddressed letter to recommend Schlegel's termination.[20] He cited: (1) the letter of counseling Schlegel received for excessive tardiness on October 13, 2010; (2) an attendance percentage of 91 percent between April 2010 and March 2011; (3) yelling at a pedestrian about a remark regarding his appearance on May 21, 2009; (4) the unprofessional remark about the bariatric gurney in front of a trainee; (5) the incident with the patient becoming upset (detailed above) on January 24, 2011; (6) lacerating a patient's elbow while raising the gurney on June 8, 2010; (7) the gurney drop on March 31, 2011, with the notation that the caregiver said the patient complained of head pain; and (8) the curb strike in April 2011. Riensche conveyed that the pattern of conduct, rather than any single incident, warranted termination. (R. Exh. 25, p. 29.)

Boxman decided not to terminate Schlegel. He considered Schlegel's long tenure with the Company, the majority of which had been very good. (Tr. 633–634.)

Schlegel took leave under the Family and Medical Leave Act (FMLA) from May 17 through July 11, 2011. According to Schlegel, Boxman spoke to him a couple days before the leave was to begin, and encouraged him to take more time because he did not expect Schlegel would have a job when he returned. (Tr. 130.)

On May 24, 2011, Wheelchair Department Manager Brian Fairbanks sent a letter to the employees in his department and various supervisors and managers, informing employees that they may be approached in connection with the union campaign. It explained that employees were not required to speak to the union representative. The letter also expressed the positive impact of Just Culture and praised the employees for how well they had responded to the program. It concluded by asking employees to make an informed decision about union representation. (Tr. 712–713; R. Exh. 17.)

On June 17, Fairbanks sent a letter to the wheelchair department employees and various supervisors and managers. The letter discussed management's awareness that union representatives were camping out at hospitals and other facilities to encourage employees to sign union cards. The letter further stated that the employees who raised the issue expressed concern that these activities were interrupting workflow and causing delays for clients. It notified employees that they have a right to learn about the Union, but asked that they not permit union activity to interfere with their work. (R. Exh. 18; Tr. 714.)

H. Schlegel's Return From FMLA Leave and Performance Improvement Plan

Schlegel returned to work on July 11, 2011, and he was brought into a conference room with Riensche and Weeks, who presented him with a performance improvement plan (PIP). (Tr. 131.) The PIP referenced the curb strike in April 2011, which resulted in a complaint and claim of injury by the patient. It also referenced the March 2011 incident of the gurney safety latch failing to catch, as well as the incident from June 2010 when a patient's elbow was scraped as Schlegel was raising the side of the gurney. The PIP cautioned that any further complaints of patient injury in the next year could result in discipline, including termination. The PIP also instructed Schlegel to write a report/presentation on the dangers of inattentiveness and situational awareness. (GC Exh. 32; Tr. 132.) During the meeting, Weeks explained that a CAP was meant to address behavioral issues, while a PIP was meant to address performance issues. (R. Exh. 25, pp. 33–35.) Weeks determined that the series of incidents cited were performance-related and the common thread was inattentive behavior. (Tr. 948.)

Weeks opined that Schlegel had under-reported the curb strike incident to Roth, stating that he just tapped the curb, and therefore all Roth was prepared for was to talk to the family if they called. Weeks said he spoke with the husband, who had mentioned that Schlegel told him he had hit a puddle of water which caused the vehicle to hit the curb. He and other unidentified individual(s) (referred to only as "we") checked the national weather service report, which showed 1/4000 inch of water had fallen in the 24-hour period prior to the incident. (Tr. 951–952.)

With regard to the report about the dangers of inattentiveness, Schlegel testified that he wrote it and placed it in

[19] It is not clear what Weeks is referencing when he states he received additional complaints about Schlegel's behavior after the second CAP and before his April 28 letter. The complaint about the gurney safety latch failing to catch occurred on May 5, and the Respondent perceived it as a performance rather than a behavioral issue.

[20] Riensche attributed his delay in writing the letter to distraction from the curb strike incident. (Tr. 882.)

Riensche's in-box. (Tr. 151.) Riensche did not receive the report. (Tr. 891.) About 1.5 weeks later, Weeks told Schlegel he had not received the report, and requested a copy. Schlegel stated he gave a second copy of the report to Weeks the day after he requested it. (Tr. 150–151.) Weeks stated he did not receive the report. Schlegel was not able to produce the report for the hearing, claiming the laptop on which he had written it was stolen. (Tr. 1019.)

I. Schlegel's Suspension and Termination and His Partners' Discipline

On July 28, 2011, Schlegel and his partner Randy Watkins were assigned to post 1. (Tr. 151–152.) Post 1 is at the Cornelius Fire Department, but crews routinely parked at a nearby Fred Meyer store. Boxman stated this was permissible because the Fred Meyer store is .2 miles away.[21] (Tr. 668.) Schlegel estimated Fred Meyer was .5 miles from the fire station, and Watkins estimated it was about .3 miles from it because he observed it was more than 2 blocks away. (Tr. 233, 305.) Toward the end of the shift, Watkins, who was driving, pulled into a John Deere dealership about .7 miles from the Fred Meyer so that he and Schlegel could conduct inventory of the ambulance. (Tr. 150–152.) According to Watkins, James had told him it was .5 miles from the Fred Meyer. (Tr. 285.) Riensche claimed it was .9 miles away, according to MapQuest or another online map (Tr. 894). Watkins had posted at the John Deere facility "countless" times before, and he did not believe it was an issue. (Tr. 285–286, 293.) Schlegel was aware that this was not the assigned post, but he did not instruct Watkins to move, nor did he advise Watkins to correct his report to dispatch that they were at post 1. (Tr. 238–240.) Riensche explained that any calls that came from west of where they were parked would have been delayed because post 1 is the farthest west post. (Tr. 894–895.). Schlegel and Watkins believed the John Deere dealership was a better place to post because there was another ambulance to the west of them. (Tr. 252–253, 285–286, 300.)

Riensche learned Schlegel and Watkins were off post because Snyder had seen an ambulance parked at John Deere and thought it was an unusual location.[22] (Tr. 897.) On August 1, Schlegel was called in to meet with Riensche and James about being off post, and they told him he was going to receive a CAM. (Tr. 153–154.) On August 1, the Respondent prepared a CAM for Schlegel, instructing him to advise dispatch for any deviation from posting/assignments. (GC Exh. 36.) Weeks delivered the CAM to Schlegel because Riensche was not going to see him for an extended period because of scheduling.[23] (Tr. 958; R. Exh. 25, p. 37.) Schlegel and Weeks signed the CAM on August 8.[24] (GC Exh. 36; R. Exh. 25, p. 36.) The CAM defines post 1 as "either Station 8 or Fred Meyer in Cornelius."

Watkins recalled meeting with James on August 1, 2011, to talk about what had occurred and to figure out why he and Schlegel were off post. Watkins apologized, and explained to James that there was another ambulance that came into post 1, and that he made a judgment call. James explained to Watkins the importance of posting in the correct location, and stated they wanted to make sure posting was adequate because they had noticed some recent errors.[25] (Tr. 285–286, 300.) James filled out a coaching memorandum about the incident, but did not show it to Watkins. (Tr. 290.)

A few days later, before Schlegel started his shift, Weeks informed Schlegel he was supposed to receive a CAP rather than a CAM. At the end of the shift that same day, James met Schlegel and Watkins at post 5 and presented Watkins with a CAM, dated August 1. (Tr. 156–157, 288; GC Exh. 42.) James had erroneously prepared the coaching memorandum initially, but it was changed to a CAM because the infraction at issue concerned behavior rather than performance. (Tr. 677, 682–683.) Watkins and James signed the CAM on August 8, and Weeks signed it on August 9. (GC Exh. 42.)

In Watkins' experience, going off post is common because, as he illustrated by example, certain posts do not have amenities such as restrooms or food. Some of the senior paramedics he worked with called dispatch when they strayed from the post, and others did not. (Tr. 293–195, 305.) Trevor Olsen, who worked for Metro-West as a part-time junior paramedic from July 2010 to November 2011, observed that "[n]ever did anybody park exactly at the assigned location." He explained that the posting locations were intersections, so the paramedics would park somewhere near the intersection where there was a bathroom and food. He believed it was okay to post within a mile of the assigned posting location, based on what FTO Mark Francum had told him. He sometimes parked at a Quik Mart about a mile or 1.25 miles from post 1. He knew of other employees who posted at a Wal-Mart about a mile from post 1. (Tr. 329–331.) No paramedics were disciplined for parking at the Cornelius Wal-Mart. (Tr. 993.)

Post 13 is at the intersection of Tualatin-Sherwood Road and Avery Street.[26] Paramedics sometimes park at 119th Avenue and Itel Street, .61 miles away. (Tr. 160–163, 235; GC Exhs. 37–40.) Snyder recalled post 13 as being at 115th and Tualatin-Sherwood Road. (Tr. 774.) At that intersection, there is a Space Age gas station, but Snyder said crews never post in their parking lot. Snyder posted at 119th and Itel, and considered it as being on-post. (Tr. 774.) No other employees were disciplined from January 1, 2009, through the date of the hearing for failing to post at the appropriate location. (Tr. 850; GC Exhs. 51–52.)

On August 2, 2011, James sent an operations update that reminded employees of the need to check in with dispatch if they wanted to get food or a drink when arriving early for a scheduled call. (R. Exh. 22; Tr. 780–782.)

[21] In some parts of the transcript, "Meyer" incorrectly appears as "Myer."

[22] Snyder did not attest to this during her testimony.

[23] Riensche took a sabbatical in August 2011, and Jeff Mathia filled in as supervisor. (Tr. 893.)

[24] The space for the supervisor's signature is blank, ostensibly due to Riensche's sabbatical.

[25] Riensche recalled also being present at the meeting (Tr. 892), but Watkins did not mention him, and Riensche was on sabbatical at this time.

[26] The transcript erroneously says "12th" rather than "Tualatin."

On August 12, 2011, Riensche sent an email to Boxman recommending Schlegel's termination. He cited Schlegel's failure to follow through with his PIP by failing to submit a report on the dangers of inattentiveness that was due August 1. He also referenced the incident where Schlegel was spotted posting approximately 1 mile off post. Riensche concluded that Schlegel continued to show a substandard work ethic, and opined this was a slight to the hardworking employees who did not behave in such a lax manner. (R. Exh. 25; Tr. 899.) On August 15, 2011, Weeks sent Boxman another letter recommending Schlegel's termination. Weeks noted Schlegel's failure to complete the PIP by failing to turn in the report by August 1. Weeks further conveyed that Schlegel was observed posting over a mile from where he stated he was. He based his recommendation on Schlegel's continued substandard performance. (R. Exh. 25, p. 39; Tr. 956–958.)

Boxman discussed these recommendations with Riensche and Weeks, respectively. According to Boxman, Riensche in particular was frustrated that his first recommendation had not been acted upon, and felt very strongly that Schlegel should be terminated. (Tr. 635–636.) Boxman decided not to terminate Schlegel. Boxman testified that he advised Schlegel that he had a second recommendation from his supervisor and department manager, and told him he still held out hope that Schlegel could turn things around. (Tr. 636.) According to Boxman, Schlegel responded that he was going out on medical leave, and Boxman advised him to take the time to think about everything.[27] (Tr. 637.)

On October 25, 2011, Schlegel parked in front of Fuiten and Boxman's offices with union posters in his front windshield. (Tr. 164; GC Exhs. 40–41.) Management did not tell Schlegel or any other employees to remove posters from their vehicles. (Tr. 217.) The same day, the Respondent received a MWA Medicguy Facebook page showing responses to an employee survey and explaining how the Union could help. (Tr. 801, 860–861; GC Exh. 28.)

On October 25, Schlegel worked with Brent Warberg. According to Schlegel, they were called for a nonemergency transport to take a bariatric patient from St. Vincent's ER to her home. On the way to get the patient, Schlegel and Warberg stopped to pick up lunch because it was 3 p.m. and they had been working about 4–5 hours but had not yet eaten. (Tr. 168–170.) This took about 15 minutes. (Tr. 170, 242.) Schlegel did not notify dispatch about this, and was unaware of whether Warberg did. (Tr. 243.) When Schlegel and Warberg arrived at the hospital, Schlegel spoke with a friend from AMR for what he estimated was up to 12 minutes. (Tr. 244.) Schlegel then instructed Warberg to let dispatch know they had arrived at the hospital. (Tr. 171.) Meanwhile, Jeff Mathia arrived in his vehicle with a patient, and had a quick turnaround. When Mathia left, Schlegel parked in his spot and proceeded to get the patient. (Tr. 172.)

[27] This testimony is obviously incorrect, as Schlegel went on FMLA leave after the first recommendations for his termination, not the second.

The Respondent's account of events tracks Schlegel's for the most part. Weeks and Riensche received an incident report recounting Schlegel's actions from the time of dispatch. (R. Exh. 25, pp. 4–42.) Weeks believed Mathia prepared the incident report.[28] (Tr. 961.) The incident report, which does not reference Warberg, states that Mathia arrived at 5:33 p.m. and saw Schlegel bent over the passenger seat while standing outside his unit. When Mathia exited the facility after dropping off his patient, Schlegel's vehicle was in the middle lane, and an AMR unit was parked to the left of it, blocking in Mathia's vehicle. Mathia asked Schlegel to move his vehicle so he could leave, and at that point Mathia noticed Steve Fritz from AMR exiting his vehicle. Mathia contacted dispatch, who told him that the time of Schlegel's pickup was "now." Dispatch called Mathia back and informed him that Schlegel was dispatched at 4:32 p.m. and he did not call in the arrival until 5:38 p.m. He did not go into the building until approximately 5:49 p.m. Mathia inspected GPS logs and found that Schlegel stopped at 181st and Glisan at 4:32 p.m., left that location at 4:58 p.m., and arrived at St. Vincent's at 5:32 p.m. (R. Exh. 25, pp. 40–41.)

On October 26, Weeks memorialized what Mathia had reported to him, and added a timeline based on his investigation into the delay. (R. Exh. 25 p. 42; Tr. 925, 961.) Weeks' document notes that Mathia had checked with dispatch and learned the pickup was to be ASAP. Upon investigation, Weeks' report states learned that the ambulance Schlegel and Warberg were driving was stopped en route for about 15-1/2 minutes. Schlegel and Warberg arrived at St. Vincent's at 5:32:41 p.m. per the AVL, and called the arrival into dispatch at 5:37:06 p.m. Mathia arrived shortly after 5:33 p.m. and saw Schlegel visiting with the AMR crew. He saw Schlegel and Warberg enter the hospital at 5:49 p.m. (R. Exh. 25, p. 42.)

On October 26, 2011, Lee called Schlegel into the conference room and told him he had taken too long to respond to the call the previous day. Schlegel told her what had transpired, and Lee told him this was a serious infraction. Lee notified Schlegel he was suspended, and that if investigation into the matter yielded nothing, he would be paid for the day. (Tr. 176–178; R. Exh. 25, p. 43.) Warberg received a CAM for the incident because he had no prior discipline. (Tr. 674–675, 682.)

According to Schlegel, paramedics traditionally have been able to pick up food during their shifts. They work 10–12-hour shifts with no scheduled meal breaks. (Tr. 176, 270.) Trisha Preston, a junior paramedic, had not been told to call dispatch to let them know she was getting a meal if there was plenty of time to get to a call, and the crew did not stray from the route. (Tr. 271.) Olsen was not aware that he needed to tell dispatch if he stopped to buy a meal during his shift. No supervisor or manager ever told him this. (Tr. 331–333.)

[28] Another accounting of the events on October 25 is at R. Exh. 32. Weeks identified R. Exh. 32 as an incident report from Mathia. (Tr. 962.) It is plainly not an incident report. It notes all the things leading to the decision to terminated Schlegel, which did not involve Mathia. The document refers to Mathia in the third person, while other documents Mathia wrote do not. See R. Exh. 25, p. 40.

On October 27, 2011, Riensche sent Boxman and Weeks an email again recommending Schlegel's termination. He summarized his previous requests, and referenced the CAM Schlegel received for being off post on August 8, as well as the incident on October 25, detailed directly above. Riensche noted that the stop for food and loitering time outside the ER delayed the response time by 31 minutes. (R. Exh. 25, p. 44.) Riensche believed the latest incident was poor customer service and that it demonstrated that Schlegel had not responded to any of the efforts to coach him and help him improve. (Tr. 901, 904.) Weeks sent Boxman an email that same day essentially echoing Riensche's recommendation. (R. Exh. 25, p. 45; Tr. 960.) Weeks also provided a time line of the events that led to his recommendation. (Tr. 963; R. Exh. 33.) Boxman spoke with Weeks, who expressed frustration that he had not acted on the previous recommendation. Boxman also spoke with LeSage, who confirmed that the termination was in line with the Just Culture program. (Tr. 638, 655.) Boxman based his decision to terminate Schlegel on all the events that had occurred, and explained there were no signs that Schlegel wanted to improve. (Tr. 641, 674.)

On October 27, Schlegel was called to meet with Weeks, Riensche, and Boxman in Boxman's office. Boxman told Schlegel he was terminated. (Tr. 187, 905, 964; R. Exh. 25, p. 46.)

J. Alleged Surveillance and Threats

Neil Lundin has worked in Metro-West's wheelchair division as an EMT basic since March 2011. (Tr. 403.) Fairbanks is manager of the wheelchair division, and Phil Reid and Christopher Brooks are supervisors. (Tr. 404, 688.) Fairbanks has an office, but spends "a good portion" of his day where his vehicles and employees are, i.e., in the parking lots, shop area, fuel pumps, and crew rooms. (Tr. 692–693.) On average, he is in the middle and rear parking lots where the wheelchair vans park for 2–3 hours in the morning and an hour or 2 in the late afternoon/evening. (Tr. 695–698.) Fairbanks also travels through the crew room throughout the day. (Tr. 701.) Boxman testified that he wants supervisors out in the parking lot to interact with the crews and "they're out there a lot, a whole lot, and that's the expectation." (Tr. 600–601.)

Lundin became active in the union campaign in August 2011. After he clocked out, he would approach employees in the Respondent's back and middle parking lots after their shifts and ask they were interested in the Union. (Tr. 404–407.) Schlegel and Melissa Morgan also did this, along with another employee who no longer works for the Respondent. (Tr. 453.) In anticipation of the petition that was ultimately filed on November 21, 2011, the Union began increasing its campaign efforts at Metro-West. (Tr. 41.) On October 21, 2011, Lundin started putting a sign that says, "Strength is a Teamsters Contract" on his front windshield. (Tr. 408; GC Exh. 40.) During the union campaign, junior paramedic Trisha Preston noticed that supervisors were in the parking lot more frequently and for greater lengths of time than usual. They were "just roaming around making sure people weren't loitering." (Tr. 269.)

On November 8, 2011, Lundin encountered Fairbanks and Reid in the parking lot at the beginning of his shift. He had not seen both of them in the parking lot at the same time previously. Fairbanks asked Lundin how long he had been with the Company, which Lundin understood was in relation to Fairbanks' desire to give him his 6-month evaluation. (Tr. 410–411, 459–460.)

On November 9, employee Twyla Wells complained to Zimmer that there was someone hiding in the bushes, and every time someone shined a light, he would hide. Zimmer asked Wells to write up her complaint, which Zimmer turned over to Boxman. (Tr. 832.) That same day, Wells complained to Boxman that she did not feel safe in the parking lot because people were "in the bushes and kind of harboring and hiding and it seemed inappropriate for business." (Tr. 584.) Following Wells' complaint, Boxman heard supervisors talking about VST complaints of people in the parking lot. He inquired, and learned that the VSTs were frustrated because the people in the parking lot were interfering with their ability to park the wheelchair vans. (Tr. 585–587.)

At 4:27 p.m., Weeks sent an e-mail to the paramedic supervisors informing them that some employees have been socializing in the parking lot after hours and not allowing VSTs to park vans in open spots. It informed the supervisors that the employees are not permitted to interfere with anyone's work, and that the employees had been instructed to contact their supervisors if this occurred. The email concluded by instructing the supervisors to investigate any such complaints promptly. (R. Exh. 35.)

On November 10, Lundin saw Fairbanks in the back parking lot as he was returning from his shift at around 5 p.m. Lundin reversed his vehicle into a space, and had his Teamsters poster displayed in his front windshield. After he clocked out and returned to his vehicle in the back parking lot, Lundin saw Boxman and Paul Austin, the hospital liaison, in the parking lot. (Tr. 412.) According to Boxman, there was "a lot of noise" and some employee complaints, so he wanted to see for himself what was occurring. (Tr. 589.) Boxman and Austin approached Lundin and they engaged in idle conversation. (Tr. 412–413, 590–591.)

Fairbanks recalled that Jocelyn Johnson, then-supervisor for the wheelchair department, was in the middle parking lot conducting inventory of the wheelchair vehicles' seatbelt straps. (Tr. 703–705.) From Johnson's later email to Boxman at 7:11 p.m. on November 10, it appears she was conducting inventory of oxygen tanks. (R. Exh. 16.) Johnson approached Lundin with a work-related question. He informed her that he was off the clock talking to employees about the Union, and did not want to discuss business. At one point, per Johnson's notes, Lundin raised his voice and exclaimed that he had a right to be in the parking lot. Fairbanks described Lundin's tone as "don't bother me" and he intervened in Lundin and Johnson's conversation to avert an argument. (Tr. 416, 709–710; R. Exh. 16.) The back parking lot is not well lit. Fairbanks got into a wheelchair vehicle and parked it at the entrance of the back parking lot with the headlights facing Boxman, Austin and Lundin. (Tr. 412–413, 707.)

Lundin then approached David Hawkins, another EMT basic, to discuss the Union but Hawkins said he was not inter-

ested in talking to Lundin with Boxman in the parking lot. (Tr. 414.) According to Boxman, as he was walking back to his office, he heard Hawkins yell, "[L]leave me alone" and express frustration about being repeatedly approached regarding the Union. (Tr. 592.) Zimmer recalled Hawkins loudly saying, "I do not want your card." (R. Exh. 26.)

Zimmer testified that she came out to the parking lot by herself, and that she thought her purpose was to ask Johnson a question about the inventory. (Tr. 833–834.) Lundin recalled seeing Zimmer with a man he could not identify. (Tr. 417.)

At 6:32 p.m., Boxman sent an email to the employees stating that he had received complaints about people lingering in the bushes and back parking lot, making employees uncomfortable, and interrupting the workflow of the VSTs. Boxman further informed employees that managers would be randomly walking to the parking lots, and informed employees to let management know if they saw people lingering in and around the parking areas. (Tr. 422; GC Exh. 45.)

Riensche arrived at work at 7 p.m. and noted that Zimmer and Boxman were still there. (Tr. 907.) Zimmer talked about the activity in the parking lot with Boxman and Riensche. They discussed how they had received "some complaints about people being out in the parking lot, like the gentleman the night before who was out in the bushes, just the overall safety of our crews." (Tr. 834.) Zimmer added that Matt Mosso had stated Neil Lundin and Melissa Morgan had been harassing the VSTs and not allowing them to park in certain spots. Zimmer also recalled that Mosso, prior to the evening of November 10, reported that the union organizers would startle Lidia Murzea by wanting to talk to her as she was getting out of her van. Zimmer made a note to file about Mosso's complaint. The note is undated but recalls the complaint as occurring on November 9, and she testified she made the note on November 9. The note to file does not reference any activity of Morgan, but adds that "Anthony" showed Mosso a card Lundin had given him. It also added that Lidia complained that "they" walk up in between the vans and startle her. Zimmer asked Mosso to write up his complaint, and asked Mosso to have Murzea and "Anthony" writeup their complaints the next time he saw them. (R. Exh. 26; Tr. 835–838.)

Zimmer returned to the middle parking lot with Boxman and Riensche. (Tr. 417–418, 908). Riensche, who went as a supportive measure for Boxman and Zimmer, recalled it was the back parking lot (Tr. 907–909). Lundin spoke with EMT basic Kelby Nelson about the many supervisors in the parking lot, and Nelson commented, "It is what it is and it won't go away." (Tr. 418–419.) Boxman, Zimmer, and Riensche then came to the back parking lot, and Boxman suggested to Lundin that it was time for him to go home. (Tr. 419.) Boxman informed Lundin that they had received a complaint on November 9 that there was someone hiding in the bushes in the parking lot making employees feel uncomfortable. (Tr. 419.) Boxman also stated that the vehicle service technicians (VSTs), who service wheelchair vans in the parking lots, were complaining about a lack of parking available to them. (Tr. 419–420, 608–609.) There were parking spaces available, but Lundin offered to park in the overflow lot. (Tr. 419–420.) Boxman described his reason for returning to the parking lot as follows:

> Q. Is that the only time that you went out to the parking lot that night?
>
> A. No. I went back to my office and tried to do some more work and the talk regarding, actually, a little bit of time had passed and it was—it started up again as far as, I tried to park my van and I was told to move away and I was like, oh, here we go again, let me see what's going on and I walked back out there, out to the back parking lot and I saw Neil still out there.
>
> Q. And were you alone at that point?
>
> A. No, I believe Melissa Zimmer joined me and I think it might have been Kevin Riensche.
>
> Q. Okay. And why were Kevin and Melissa with you?
>
> A. They were working and they were listening, they had been hearing this for a little while and they—I said, I'm going to go check it out, well, we're going to go too because there was a lot of curiosity as to what was happening, you know, trying to verify what the VST's are saying, I can't get my work done with—well, let's see for ourselves and try to correct the situation. So they just kind of tagged along.
>
> Q. And so continue, when you went to the parking lot what did you see?
>
> A. Neil Lundin.
>
> Q. And what was Neil doing?
>
> A. They were standing there in the parking lot and again, there wasn't—at that point there wasn't anybody else around but Neil.

Boxman informed Lundin that he was going to stay in the parking lot. Boxman then returned to his office because it was quiet in the parking lot. (Tr. 420, 594.)

Lundin was by himself for awhile, until Boxman, Zimmer, Riensche, and possibly some others returned with J. D. Fuiten, Metro-West's owner. (Tr. 420–421, 594.). Boxman testified that VSTs again complained, and specifically named Lundin. Fuiten told Lundin that it was time for him to leave. (Tr. 420–421, 596, 672.) Lundin left at approximately 6:10 p.m.[29] (Tr. 421.)

On November 11, Wells sent an email to Boxman describing what she saw:

> Larry:
> As requested, I am reporting the event from Wednesday, the 9th of Nov. We were coming in for end of shift. As we came around the comer by the rear of the Homewood Suites, there was a person, standing by the fire hydrant. When He (sic) saw us, He (sic) seemed disturbed by our seeing him, and he moved off to the side. The best description I can give, is: Younger, thin male, wearing a jacket, and knit hat. Maybe there is a security camera available at the hotel, which would show the activity. Thank you, Twyla Wells

[GC Exh. 13.]

[29] There is a conflict as to the time, as Riensche stated he did not arrive until 7 p.m.

On November 14, Lidia Murzea wrote Lee an email, copied to Boxman, stating as follows:

> Hi Jan,
> I just wanted to write you an e-mail regarding the incident with the union supporters so that it will be on record. There have been many times when the EMTs stand in the middle of the lot, which prevents us from moving the wheelie vans efficiently and takes up a majority of available parking. There have even been times when I attempted to pull into a spot and they motioned me to choose another so that their cars could be closer together. I have been approached during my shifts and asked whether or not I would like to support their cause. Since Larry has sent out the e-mail regarding this issue, there haven't been any problems. However, I have heard from other VSTS that EMTs have been making jokes that they "will not jump us in the parking lot." I appreciate the fact that the supervisors have addressed this issue. Thank you for your time.
> Warmly,
> Lidia Murzea

(R. Exh. 14.) Boxman received no further complaints about interference with employees' work in the parking lot. (Tr. 615.)

Employees call the crew line the evening before each shift to determine if there are any schedule changes. (Tr. 466, 691.) When Lundin called the crew line to determine his start time the following day, November 11, he was informed he would start at 10 a.m. rather than his usual start time of 8 a.m. He had been asked to start his shift at 10 a.m. one other date, July 4, 2011. (Tr. 428–29.) He worked a full shift on November 11 and clocked out at 8 or 9 p.m. (Tr. 429.)

On November 17, Lundin's shift ended at 6 p.m. (Tr. 431.) Because of the email Boxman sent regarding the parking lots, Lundin went to the crew room to talk to employees about the Union. A few employees were in the crew room, and Lundin spoke with two EMT basics, Hannah Armstrong and Allie Sayre. (Tr. 432–433.) He noticed that Fairbanks walked back and forth, and then Snyder began walking back and forth and it appeared to Lundin as if she was looking for someone. (Tr. 433–434.) Snyder goes into the crew room and/or passes through it several times a day for a variety of reasons. (Tr. 775–776.) Snyder recalled that on November 17 she had gone through the crew room to get a piece of equipment in the adjacent supply room, and then came back. Snyder and the employees engaged in general chatter, and then Fuiten came in and said it was time for everyone to leave. (Tr. 433–434, 78–80.) The following day, Lundin went to the supervisor's office to talk to Phil Fried. While Fried was on the phone, Fuiten came in and suggested that it was time for Lundin to go home. Lundin told Fuiten he needed to talk to Fried, asked Fuiten if he should leave afterward, and received an affirmative response. (Tr. 435.)

Fairbanks re-sent his May 24 letter, described above, on November 18, 2011. (R. Exh. 19; Tr. 722.)

MacPherson filed a petition with the Board to represent Metro-West's employees on November 21, 2011. (Tr. 39–40.) On November 22, Lundin passed out union flyers in the parking lot following his shift. After about 15 minutes, Supervisor Jeff Mathia approached Lundin and told him Fuiten had said it was time for him to leave. (Tr. 436–437.) Lundin was asked to leave on one more date between the petition and the election. (Tr. 440.)

Mathia typed a summary of a parking lot safety check he performed, and there is a handwritten notation that reads "11-22-11, 12:45 hours." (GC Exh. 9.) He followed Lundin to each employee he approached, and after Lundin handed the employee a flyer, he "cut him off and started a dialog with each one." Mathia encouraged them to think hard about their decisions and to come to management with any questions. He reported that the employees had not talked to management, and that the Union had instructed them not to. After finding out Lundin was no longer on the clock, Mathia asked him to leave. He similarly asked Melissa Morgan, who was handing out flyers, to leave. (GC Exh. 9.)

On November 23, Fairbanks sent an email to the wheelchair division employees, stating that due to complaints about increased "agenda promoting" in the parking lots, Metro-West was going to enforce "the existing practice of not loitering in the workplace, or on the property, when you're not scheduled."[30] (GC Exh. 46.) Fairbanks testified he sent this in response to employee complaints that they were not able to move around in the parking lot because of the union activity. He specifically mentioned David Hawkins, Kim Giarcho, Chase Holenstein, and Alex Goldman. (Tr. 718–719.) Lundin observed it was common practice for employees to hang out in the crew room or parking area to wait for traffic to subside. He was not aware of any rule or practice prohibiting this. (Tr. 438–439.) Fairbanks agreed he was mistaken, and that no such rule existed. (Tr. 720.)

On December 6, 2011, there was a hearing to determine the appropriate bargaining unit. The following employees testified at the hearing: Schlegel, Melissa Morgan, Neil Lundin, and Zach Mesberg. (Tr. 40.)

On December 14, 2011, Fuiten sent a letter to all employees and supervisors sharing his "philosophy" regarding the importance that Metro-West remains nonunion. He explained that a union can drive a wedge between employees and management, and noted that unions often interrupt operational freedoms. Fuiten informed employees that he asked Boxman to take the lead and educate them about "the other side of the story." He asked for employees to keep an open mind, and expressed his belief that they would give the Company another chance by voting "no" in the upcoming election. (GC Exh. 9; Tr. 525.)

Boxman testified that in early 2012 in he received complaints that union representatives would approach employee while they were at their posts trying to complete their charts. The employees felt harassed because the representatives would follow them and not leave them alone when asked. Employees were also approached at hospitals and reported the same prob-

[30] Fairbanks was referring to solicitation of signatures when he stated "agenda promoting." (Tr. 720.)

lems (Tr. 616–17). On January 9, 2012, Boxman sent out an email to employees outlining the problem, and informing them that interfering with work was not protected activity. He encouraged employees to notify a supervisor or dispatch and/or hospital security if anyone tried to interfere with their work. (R. Exh. 15.)

The election was held on January 12 and 13, 2012. (Tr. 39.) Following the election, Lundin has not been told to leave after shift despite remaining on the Respondent's property. (Tr. 441.) Lundin has not seen managers or supervisors in the middle or back parking lots.

On February 16, 2012, Snyder issued Lundin a letter of commendation for his swift actions and teamwork while assisting a patient during a call. (R. Exh. 23; Tr. 784–785.)

On March 7, 2012, Lundin and Fairbanks met. (GC 47; Tr. 444, 725–726.) According to Lundin, Fairbanks asked Lundin if he joined the Company with the intention of "overthrowing the company and going to war with the company." Lundin responded that he did not, but that he obviously supported unions. Fairbanks told Lundin the union supporters had hindered his efforts to improve the wheelchair department for 6 months. He also said he had read the Facebook pages, he and others were offended by some of what was said, and he was surprised Lundin didn't post very often. Fairbanks then asked Lundin about his career goals, and informed him that management would not forget what he had done, and he would not be able to advance in the Company. He also stated that he thought Lundin would leave after the election. (Tr. 444–446.) According to Fairbanks, he asked Lundin about his career goals because he does this for all employees, and when Lundin responded that he was unsure, the conversation ended. (Tr. 726–727.)

III. DECISION AND ANALYSIS

A. Disciplinary Actions

1. Schlegel's October 2010 suspension, demotion, and corrective action plan

The complaint, at paragraphs 5 and 17, alleges that the Respondent suspended Schlegel on October 27, 2010, and demoted him and issued him a CAP on October 29, 2010, because he engaged in prounion activities and protected, concerted activities in violation of Section 8(a)(1) and (3) of the Act.

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Rights guaranteed by Section 7 include the right to engage in union activities and "concerted activities for the purpose . . . of mutual aid or protection." Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

The Respondent analyzes the allegations under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), while the Acting General Counsel provides alternative analyses under *Wright Line* and Board case law applicable to disciplinary actions that result from protected activities. I address both theories below.

The Board has held that *Wright Line* does not apply to situations where a causal connection between the employee's protected activity and the employer's conduct that is alleged to be unlawful may be presumed. See, e.g., *Aluminum Co. of America*, 338 NLRB 20, 22 (2002); *Atlantic Scaffolding Co.*, 356 NLRB 835, 839 (2011). An employee's discipline independently violates Section 8(a)(1), regardless of the employer's motive or a showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity*." Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). When the conduct for which an employee is disciplined constitutes protected concerted activity, "the only issue is whether [that] conduct lost the protection of the Act because . . . [it] crossed over the line separating protected and unprotected activity." *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. mem. 63 Fed. Appx. 524 (D.C. Cir. 2003). As such, it is first necessary to determine whether Schlegel engaged in protected concerted activity.

The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (21984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887.

I find that Schlegel's comment about the Respondent's potential need for a union, made in response to Riensche's direction to Schlegel and Olsen to post with the bariatric stretcher, was protected concerted activity. Though the Respondent argues that complaints about posting with the bariatric stretcher were unique to Schlegel, the evidence, detailed above, shows that paramedics complained about posting with the bariatric stretcher both because of difficulty carrying and manipulating it, as well as concerns that it is less secure for smaller patients. There was also confusion at the crew level about the Respondent's policy on posting with the bariatric stretcher. I find, therefore, that Schlegel's remark to Riensche, a supervisor, brought a group complaint to management's attention. The Respondent argues that Schlegel did not voice a complaint about the bariatric stretcher to Riensche, but instead simply asked Riensche whether or not he was supposed to post with the bariatric stretcher. This argument fails, as I consider Schlegel's question, Riensche's response, and Schlegel's reply as a whole. See *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295 (2011). Moreover, Weeks' timeline of events that led to his recommendation to terminate Schlegel notes, in regard to the November 8, 2010 CAP, "While acting as a Field Training Officer, Schlegel demonstrated unprofessional behavior in presenting complaints to a supervisor." (Tr. 963; R. Exh. 33.)

It is abundantly clear the decision to suspend Schlegel for the remainder of his shift on October 25 was driven by his interaction with Riensche that morning. Weeks testified that the comment prompted a meeting to "decide how to proceed with the behavior he exhibited that day." (Tr. 934.) Snyder's recollection of Riensche's account of his October 25 conversation with Schlegel was that Schlegel mentioned something about the bariatric policy and a union, as well as the "Love ya" comment. Snyder listed some other factors, detailed herein, that caused her to be concerned about Schlegel's behavior. There is no doubt, however, that the decision to call Schlegel off his shift and send him home on October 25 would not have occurred but for his interaction with Riensche that same morning. None of the supervisors who testified said they were contemplating discipline about other enumerated prior events until Schlegel's exchange with Riensche on October 27. The evidence clearly shows this interaction was the catalyst for Schlegel's demotion and the CAP on October 29.

Though, in the end it is a distinction without a difference under the facts of this case, I will address the Respondent's argument that it was the tone or manner rather than the content of Schlegel's remarks that led to the discipline. First, the record reflects that the Respondent took umbrage at the content of Schlegel's remarks, not merely the tone. This is clear from Snyder's testimony that in response to the word "union" coming up, she said, "Travis, why did you say that? You know how they feel around here about that." Had the substance of Schlegel's speech been benign, this comment has no place. Snyder could not recall how she, Weeks and Schlegel were discussing the Union. Schlegel, however, recalled that he asked what he did wrong and Weeks responded, "Union, you said union," prompting Snyder's remark. Weeks denied making this comment. I credit Schlegel's account of this conversation. First, it is the most inherently plausible. In addition, when describing the exchange, Schlegel's testimony was open, straightforward and clear. By contrast, Weeks was asked verbatim whether he made the specific comment Schlegel attributed to him, and he replied, "No." I find Weeks' directed testimony less persuasive than Schlegel's narrative and open-ended description of what transpired, particularly in light of Snyder's admitted comment. In addition, the CAP states, in relevant part, "On 10–27–10 you made derogatory comments about Metro West Ambulance to supervisor Kevin Riensche. These comments were made in front of your trainee and were unprofessional." (GC Exh. 13.) Thus the CAP deems the unspecified comments themselves derogatory and unprofessional.

The CAP also references an e-mail regarding charting.[31] The referenced email is a source of confusion. Schlegel sent two e-mails on October 11, one regarding charting, and another regarding (ironically) the requirement to check emails. Riensche, Weeks, and Snyder testified the CAP refers to the email regarding the requirement to check emails, but this makes no sense, as the CAP itself refers to an email about charting. In any event, I find both emails constitute protected concerted activity. The emails both address how to request compensation for work employees are being asked to perform. The Respondent's policies or practices regarding compensation for incidental tasks concern employees generally and changed after the Union election. (Tr. 446–447, 462–463.) Gregg's notes from the January 2011 supervisors' meeting reference senior paramedic Brandon Klocko making a formalized inquiry about the email: "'When are we supposed to send these e-mails' says Klocko." (R. Exh. 24; Tr. 94.) As such, I find Schlegel's emails constitute protected concerted activity under the Act. *Anco Insulations, Inc*., 247 NLRB 612 (1980) ("ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees").

The Acting General Counsel asserts that Schlegel's comments were also union activity, and thus are protected by the Act. The Respondent counters that Schlegel did not engage in union activity. In *Randolph Div., Ethan Allen, Inc. v. NLRB,* 513 F.2d 706 (1st Cir. 1975), enfg. 212 NLRB 148 (1974), an employee asked the company's assistant superintendent for financial information, stating she was worried because there was no union. The court found the statements were protected union activity, stating:

> If an employer were free to fire any employee who showed a specific interest in the unionization of its employees, it could effectively forestall the exercise of section 7 rights by excluding from the work force all who showed any interest in exercising them. If it could so extinguish seeds, it would have no need to uproot sprouts.

Id. at 708. See also *Signal Oil & Gas v. NLRB*, 390 F.2d 338, 343 (9th Cir. 1968), enfg. 160 NLRB 644, 649 (1966). I likewise find that Schlegel's remarks were protected union activity.

Because Schlegel was disciplined for engaging in protected activity, I turn to the issue of whether Schlegel's remarks lost the Act's protection. An employee's leeway for impulsive behavior when engaging in protected activity is not without limit, and is subject to the employer's right to maintain order and respect in the workplace. See *Piper Realty Co*., 313 NLRB 1289, 1290 (1994); *NLRB v. Ben Pekin Co*., 452 F.2d 205, 207 (7th Cir. 1991); *NLRB v. Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965). The standard for determining whether specified conduct is removed from the protections of the Act is whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204–205 (2007), quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815 (7th Cir. 1946); See also *Hawthorne Mazda*, 251 NLRB 313, 316 (1980), and cases cited therein; *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991).

Even assuming it was the manner in which Schlegel uttered his comments rather than the words themselves that led to the discipline, Schlegel's remarks still retained the Act's protection. The Board has consistently held that comments uttered in the course of concerted, protected activity that fall short of conduct that is truly insubordinate or disruptive of the work process do not strip the employee of the protections of the Act. See *Aroostook County Regional Opthalmology Center,* 317 NLRB 218, 220 (1995), enf. denied in part 81 F.3d 209 (D.C.

[31] As articulated herein, I find that without the comments, Schlegel would not have received the suspension, demotion or CAP. I include the email(s) because the CAP, on its face, relies on it.

Cir. 1996), (Employees complaints on the workroom floor about schedule changes loudly and in "a tone of voice that conveyed their distress and exasperation" did not lose Act's protection).[32]

While the Respondent avers it was concerned about the manner in which Schlegel expressed his displeasure with bariatric policy, not the content of what he said, I note first that only Schlegel, Riensche, and Olsen were present. Significantly, Olsen described Schlegel's tone of voice as normal, and did not perceive Schlegel's remarks as angry or disrespectful toward Riensche. In his affidavit, Olsen stated, "And although he sounded disgusted, we did not discuss they gurney." At the trial, when asked if Schlegel sounded disgusted when conveying Zimmer's instruction, Olsen testified, "Disgusted? You know, I really can't say if it was disgusted or just like, 'Really, we're doing it this way?' It sounds like it was new to him. And it was new to me too." (Tr. 343.) I credit Olsen's testimony, as it is consistent with Schlegel's. Moreover, his demeanor was confident, open and straightforward. In addition, I credit Olsen's testimony because he has nothing to gain or lose by being forthcoming and truthful. He left Metro-West voluntarily to pursue another job. There was nothing in his demeanor or in the evidence presented to indicate he harbored a grudge against the Respondent.[33] After making his remarks, Schlegel promptly complied with Riensche's order to post with the bariatric stretcher. I don't doubt that Schlegel's remarks upset Riensche. However, Schlegel's comments, though admittedly sarcastic, were simply not egregious enough to lose the Act's protection. See *Lana Blackwell Trucking, LLC*, 342 NLRB 1059, 1062 (2004) (Remarks did not lose protection even though the manager subjectively believed that the employee was rude, disrespectful and embarrassed her in front of other employees.).

Neither party's brief discusses the factors set forth in *Atlantic Steel Co*., 245 NLRB 814, 816 (1979), i.e.: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. Though I don't think a detailed *Atlantic Steel* analysis is required under the facts here, I will briefly address the four factors. See *Fresenius USA Mfg.,* 358 NLRB 1261, 1264–1265 fn. 8 (2012). First, the remarks occurred while Schlegel was working and his trainee was present, not in the context of a grievance or contract negotiations (as there is no union), or at a meeting the Respondent called to address a work issue. This weighs in the Respondent's favor. Second, the subject matter of the discussion was the Respondent's bariatric gurney policy and the potential need for a union. The evidence shows that there was ongoing concern about the bariatric policy in particular. Moreover, Boxman conceded that there had been more general communication problems between employees and management, with employees feeling they were not being heard, prompting the decision to implement Just Culture. Because the subject matter involved concerted protected activity and the potential need for a union, the second factor strongly militates in favor of finding that Schlegel's remarks retained Act's protection. See *Fresenius USA Mfg.,* supra at 1266. Turning to the third factor, the nature of the outburst, there was no outburst, and the nature of Schlegel's spontaneous remarks, while sarcastic, was extremely mild.[34] The brief exchange neither disrupted work operations nor undermined Riensche's authority to direct the crew to post with the bariatric stretcher. This factor weighs strongly in favor of continued protection. Finally, while Schlegel's remarks were not provoked by an unfair labor practice, they were provoked by Schlegel's frustration, shared by others, over a term or condition of employment. Considering the *Atlantic Steel* factors and the totality of the circumstances, I easily find that Schlegel's remarks retained the Act's protection.

Although I find that Schlegel would not have been disciplined for sending the October 11 emails absent his October 27 remarks, I will address them here briefly. There is no colorable argument to support removing either email from the Act's protection. It is not apparent from the content of the emails what parts the Respondent perceived as objectionable and/or why. When asked what was "snide" about Schlegel's email in response to the operations update reminding employees to check their email, Weeks struggled to articulate a response, stating:

> Well, it's our policy and our practice and apparently based on this known to Travis the time adjustment forms are specifically filled out for extra time you need at work for completing documentation. We make email and bulletins available to the crews while they are on duty. And so this comment was a response to this operations update where he said, some type [of central][35]—he was asking for [a central] bulletin board and then he said, as it's a requirement to check emails, where should we mark that on our time adjustment forms.
>
> Under the relationship we were having with him, that wasn't deemed as an appropriate way to request that information and Travis—we had shared with everybody the proper way to check your emails. We didn't require people to check their emails. It was a way we communicated. We communicated through a lot of different channels. And so there was really no reason to wonder about the policy of how to put that on a time adjustment form.

(Tr. 941.) Weeks described Schlegel's email about charting as another example of the same type of behavior. Snyder testified that the supervisors perceived that Schlegel was being a smart aleck about the time adjustment forms rather than being genu-

[32] Though the court of appeals reversed the Board's decision in part, its rationale focused on the setting of a small hospital and the concern that patients should not be subjected to the employees' complaints.

[33] I note that Olsen still worked for Metro-West when he gave his affidavit.

[34] Schlegel testified that he made the "love ya" comment to lighten the mood and let Riensche, who he had worked with for 13 years and considered a friend, know that he still loved him. (Tr. 201.) While I don't believe Schlegel made the comment in a serious attempt to convey his love for Riensche, I do credit his testimony that his intent was to make a lighthearted comment following the exchange about the bariatric policy. This is consistent with Olsen's perception of the comment as joking.

[35] "Of central" and "a central" are erroneously transcribed as "essential."

inely curious, but did not articulate what about the email led the unnamed supervisors to this conclusion. (Tr. 957–958.) Accordingly, I find the emails retain the Act's protection. Because Schlegel was disciplined for engaging in protected activity that did not lose the Act's protection, I find that the Respondent violated the Act as alleged in complaint paragraphs 5 and 17.[36]

Alternatively, I find Schlegel's discipline was discriminatory in violation of Section 8(a)(1) and (3) under a *Wright Line* analysis.[37] The Acting General Counsel has the initial burden to prove, by preponderant evidence, that Schlegel engaged in protected activity, the employer knew about it, and the adverse employment action at issue was motivated by it. If the Acting General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade that the action would have taken place absent the protected activity by a preponderance of the evidence. *Dentech Corp*., 294 NLRB 924, 956 (1989).

As discussed above, I find that Schlegel engaged in protected concerted activity and union activity. The protected comments directly involved Supervisor Riensche, and Managers Weeks and Snyder both knew about it. The emails likewise directly involved supervisors.

The Respondent argues that there is no evidence of animus, and no link between Schlegel's protected activity and his discipline. I disagree. In this case there is direct evidence in the form of credited testimony, detailed above, that Schlegel's discipline resulted from speaking about the need for a union in front of a trainee. The email relied upon in the CAP did not lead to discipline at the time Schlegel sent it. Because it did not lead to discipline, it is axiomatic that, absent some evidence explaining the delay, it would not have led to discipline on its own or combined with events that had already transpired. Nonetheless, regardless of which email the CAP references, I have found both to be protected concerted activity, and both were directed at supervisors.

Unlawful employer motivation may also be established by circumstantial evidence and may be inferred from several factors, including: the Respondent's known hostility toward unionization coupled with knowledge of an employee's union activities; pretextual and shifting reasons given for the employer's actions; the timing between an employee's union or other protected activities and discipline; and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc*., 344 NLRB 1188, 1193 (2005); *Promedica Health Systems, Inc*., 343 NLRB 1351, 1361 (2004).

Here, the timing of Schlegel's discipline on the heels of his protected activity, the widely known sentiment that Metro-West does not want to have a union represent its employees, and other conduct indicating antiunion sentiment discussed infra, supplement the persuasive direct evidence of unlawful motivation. The Respondent's statements about Schlegel expressing "increasing irritation with his work environment" and similar comments likewise reveal animus. See *Phillips Petroleum Co*., 339 NLRB 916, 918–919 (2003) (Letter stating, "you have indicated frustration with regard to the Company's time off policies, both through argumentative discussion with Company personnel and in writing to the Labor Relations Superintendent" indicate animus"). Additionally, the instruction in the CAP stating, "You will address your concerns about Metro West Ambulance to the Supervisor . . ." and the requirement that his communications, including email, be "supportive" show that the Respondent takes a dim view of protected concerted activity among its employees. Finally, other violations of the Act specifically found and detailed in this decision demonstrate animus. See *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011). Accordingly, I find the Acting General Counsel has sustained its initial burden.

In response, the Respondent argues that the discipline was for Schlegel's manner and tone, rather than the content of his speech, and that it would have taken the same action even if Schlegel never said the word "Union." As set forth above, this is unconvincing and I find it to be pretext, notwithstanding the fact that Schlegel was engaged in concerted protected activity.

The CAP references Schlegel's October 13 letter of counseling for tardiness. There is no record evidence that Schlegel was tardy following the letter of counseling, however. The letter of counseling warned that the next infraction of the Company's policy on excessive tardies, defined at the relevant time as more than three tardies in a 90-day period, would result in a reprimand. While there is no evidence that Schlegel had sustained further infractions, the CAP expanded his improvement goal for attendance from having no further incidents of being tardy three times in a 90-day period to maintaining acceptable attendance per Metro-West Policy. Accordingly, I find that the Respondent has not presented any legitimate reason for issuing additional discipline based on any additional violation of its then-current excessive tardiness policy.

Finally, Snyder testified she also considered an occasion where Schlegel came to work with a wrinkled uniform, his failure to fill out observation reports correctly, and his failure to attend the last two FTO meetings. Schlegel missed one of the two FTO meetings because he was working. None of these incidents were cause for discipline at the time, and they are not referenced in the CAP. See *Care Manor of Farmington*, 314 NLRB 248, 255 (1994). Moreover, even if some of the referenced incidents might have constituted legitimate cause for discipline, "an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee," *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), since "the policy and protection provided

[36] I also find The Respondent's actions of suspending, demoting and subjecting Schlegel to a CAP for his protected comments is "inherently destructive of employee rights" under existing precedent. *Signal Oil & Gas*, supra at 343–344. See also *Kaiser Engineers*, 538 F.2d 1379, 1386 (9th Cir. 1976), enfg. 213 NLRB 752 (1974); *Knuth Bros.*, 229 NLRB 1204, 1205 (1977).

[37] Though I do not find *Wright Line* applies, my decision includes a brief *Wright Line* analysis in the event a reviewing authority disagrees. I specifically find this was not a dual motivation case, as none of the reasons cited in the CAP are legitimate.

by the . . . Act does not allow the employer to substitute 'good' reasons for 'real' reasons." *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969), cert. denied 397 U.S. 935 (1970). The evidence presented, particularly the timing of events, leads me to soundly reject the Respondent's unsupported contention that Schlegel's "additional performance issues would have resulted in the [CAP]" regardless of his protected remarks. (R. Br. 30.) Accordingly, I find that absent Schlegel's comments to Riensche on October 27, he would not have been suspended, demoted, or issued the CAP. As such, I find the Acting General Counsel has sustained its burden to prove that the Respondent violated Section 8(a)(1) and (3) of the act as alleged.

2. Schlegel's March 2011 corrective action plan

The complaint, at paragraphs 6 and 17, and 18 alleges that the Respondent violated Section 8(a)(1), (3), and (4) when, on or around March 7, 2011, the Respondent extended the CAP for two additional months. The Acting General Counsel contends this was in retaliation for the charge the Union filed on Schlegel's behalf on February 23, 2011.

The CAP was based on the late January/early February patient complaint that Schlegel was rude to her when trying to convince her she needed to go to the hospital.

The *Wright Line* analysis applies to this allegation. *Gary Enterprises*, 300 NLRB 1111 (1990); *General Die Casters, Inc*., 358 NLRB 742, 744 (2012). It is undisputed that by March 7, 2011, managers and supervisors knew about Schlegel's union activity, including the MWA Medicguy Facebook page and the February 23 unfair labor practice charges. The question turns to motivation. I incorporate my findings regarding animus above. As previously noted, unlawful motivation is often established by circumstantial evidence, taking into account a variety of different factors including consistency of discipline among employees and adequacy of any employer investigation.

The Acting General Counsel submitted evidence of the Respondent's treatment of other employees with similar patient complaints. For example, in June 2011, a customer called to say that an older paramedic was rude and short with her, he did not address her discomfort, and he disregarded her feelings. (GC Exh. 50 p. 1.) Weeks said they looked into it and there was nothing the paramedic did wrong, and it was the patient's perception that the crew did not do enough to alleviate her pain. Addressing the complaint that the older paramedic was rude and short, Weeks' best guess, after talking with the crew, was that the paramedic was not rude or short, but that the patient was in pain and didn't want to hear an explanation. The paramedic received no discipline. (Tr. 975–977.)

By contrast, though Zimmer spoke with Chan generally about the incident Chan and Schlegel submitted incident reports, there was no investigation aimed at determining the propriety of Schlegel's behavior. The notes from Zimmer's conversation states, "After talking with the crew *they* stated that *they* had to get stern with her to get her to go to the hospital" and then convey the patient's perception that Schlegel "made her go" (emphasis added). Chan was the only witness present, and she testified that she never perceived Schlegel as rude. Chan perceived Schlegel's efforts as consistent with their training and consistent with how she and other paramedics handle similar situations with reluctant patients. I found Chan to be a credible witness. Her demeanor during her testimony was calm, and her responses about this incident were open-ended and appeared sincere. Moreover, at the time of her testimony, Chan had recently been promoted to senior paramedic, so I cannot discern any reason for her to have testified out of anger or bitterness toward her employer. As a current employee testifying against her own pecuniary interests, I find her testimony to be particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.,* 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries,* 197 NLRB 489, 491 (1972). Chan was never interviewed as part of an investigation to determine whether the patient's complaint against Schlegel was legitimate or whether it was "the patient's perception."[38] The lack of any meaningful investigation to discern the reliability of the patient's complaint, particularly in light of her adamant insistence that she could not afford transport, points to pretext.[39]

The Respondent issued a CAM to senior paramedic Twyla Wells on December 31, 2011, for a series of complaints she was rude. She received a CAP on March 17, 2012 (signed March 27), for again being very rude to the staff at a certain facility, prompting them to ask that she never come back. The CAP referenced multiple similar complaints in the past, with the most recent being in December. It also noted that Wells and her partner had discussed Wells' behavior, and the partner had offered to give constructive feedback when she perceived Wells' interactions with patients or customers needed improvement. (R. Exh. 31; Tr. 918–921.) Unlike in Schlegel's case, Wells had multiple incidents of corroborated rude behavior prior to receiving a CAM. Schlegel had one prior remote incident of swearing at a member of the public who told him it was not healthy to be so fat. Unlike with Wells, whose partner agreed to tell her when she her behavior crossed the line, Chan did not think Schlegel was rude. In another instance, the Respondent did not credit a complaint that Megan Rye thumped a patient on the head and told him to shut his big fat mouth, noting the patient had a psychiatric history, was altered, and had been fighting with police before the incident. (R. Exh. 50; Tr. 980.) Here, the patient was extremely reluctant to go to the hospital because she could not pay the bill. Yet, her version of events was credited, despite the fact that Chan would have refuted it if asked.[40]

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[38] I note that Schlegel is a large man with a large voice that projects in a relatively bold manner. Chan, by contrast, is much smaller and softer-spoken.

[39] The Acting General Counsel asks me to draw an adverse inference and find that Riensche assured Schlegel no discipline would ensue from the patient complaint. (GC Br. p. 53.) I decline to do this, as Schlegel's testimony prompting the request is equivocal. (Tr. 111.)

[40] Supervisor Larry Torres issued a CAM to Randy Johnson for being rude on a nonemergency call. There was no testimony or other evidence regarding whether this was the first complaint about Johnson, whether there was an investigation, or the nature of Johnson's comment. (R. Exh. 27, p. 5.)

On March 2, 2011, Frank Wallender received a CAM after a patient's sister called to say he acted too "boisterous" and "goofy" while picking up a patient, and inappropriately talked about playing golf with the patient. The patient was a nonemergency head injury patient. The patient's sister thought some of the random topics Wallender brought up were not appropriate, causing the already mentally impaired patient to be further confused. Wallender agreed that he was boisterous, and stated he was trying to cheer the patient up because she looked depressed. The sister was satisfied with Metro-West's service overall, and no further action was required on Metro-West's part. (R. Exh. 27, pp. 7–8.) In Wallender's case, it was not disputed that he acted boisterous. In Schlegel's case, in the setting of trying to convince a patient with dangerous vital signs to go to the hospital, neither he nor Chan perceived his behavior as rude or out of the ordinary.

In August 2009, a family perceived that the crew was rude to them, and requested that the bill be waived. According to Weeks, the crew was just trying to communicate that there was an order not to transport the patient. The crew was not disciplined. The Respondent nonetheless waived the bill after investigating. (Tr. 982–84; GC Exh. 50 pp. 10–11.) Schlegel and Chan were trying to communicate the gravity of the patient's vital signs and the need for her to go to the hospital. In both this case and Schlegel's, the complaint to Metro-West was that the paramedic was rude or abrupt. In the August 2009 case, the need to communicate the order to the family satisfied the Respondent that the crew was not rude or abrupt. In Schlegel's case, the need to convince the patient to go to the hospital, an admittedly clinically correct course of action, did not. Based on the foregoing, I find the Respondent investigated other employee complaints with a more even hand, was more receptive to the respective employees' versions of events, and disciplined Schlegel more harshly than other employees.

The timing of the CAP is also suspicious. The complaint occurred on February 2, yet Schlegel did not receive the CAP until March 7, over a month later. In the interim, the Union filed the February 23 charges, Schlegel participated in a picket line, hung union posters on his locker, and revealed he was MWA Medicguy. Delay can be evidence of pretext. *Doctor's Hospital of Staten Island, Inc.,* 325 NLRB 730, 738 (1998); *New Haven Register*, 346 NLRB 1131, 1143 (2006) (suspension on January 7, 2005, for events that occurred on December 23–24, 2004). Riensche attributed the delay to the need to consult with LeSage and then wait until he and Schlegel worked the same shift. The first CAP, however, was issued in a matter of days, and was presented to Schlegel during a meeting he was called into on an off-day. Moreover, such a delay provided the Respondent with time to conduct an in-depth good-faith investigation, or an in-depth good-faith "root cause analysis," yet this plainly did not occur.

I view the foregoing in conjunction with significant evidence of the Respondent's animus addressed throughout this decision. Most telling is the March 4, 2011 letter Boxman and Fuiten addressed to Schlegel, but sent to all employees, just 3 days prior to the discipline. The letter touts Just Culture and chastises the Union for spreading misinformation and trying to drag the company down. It cites the February 23 unfair labor practice charges as the Union's latest effort to harm the Company's reputation. (GC Exh. 23.) Various other communications the Respondent's managers sent also conveyed opposition to the Union, as well as frustration over the negative impact the Union's charges and/or objections filed with the Board have had on the Company's ability to move forward. (R. Exhs. 9, 10, 17; GC Exh. 53.)[41] In light of this, the Respondent's assertion that decision-maker Boxman was free from union-related animus toward Schlegel lacks credence. In addition, I find that Lee's statement to Olsen that if the Union came in, he probably would not have a job is evidence of animus.[42] See *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89, 117 (2010); *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 416 (1960). Finally, there is other evidence of union animus discussed below in the context of alleged threats and surveillance, as well as the discipline for referencing the Union in conjunction with Schlegel's protected activity, discussed above.[43]

The only behavior not related to the patient complaint cited in the March 2011 CAP is Schlegel's failure to check in with his supervisor twice a month as required by the November 2010 CAP. As the Respondent did not provide Schlegel with a copy of the November CAP until the following March, the only opportunity Schlegel had to review it was during the meeting where he received his first CAP and learned he had been demoted. Under such circumstances, I find the Respondent cannot legitimately fault Schlegel in light of its own oversight. Accordingly, I find that the Acting General Counsel proved, by preponderant evidence, that the March 2011 CAP was issued in retaliation for his Union activity in violation of Section 8(a)(1), (3), and (4).

3. Schlegel's July 2011 performance improvement plan

Paragraphs 10(a), 17, and 18 of the complaint allege that the Respondent violated Section 8(a)(1), (3), and (4) of the Act when on or around July 11, 2011, the Respondent issued Schlegel a performance improvement plan (PIP).

Schlegel was on FMLA leave from May 17 to July 11, 2011. The day he returned, Riensche and Weeks presented him with a PIP, citing three instances of patient injury within a year resulting from Schlegel's inattentiveness and lack of situational awareness. The three incidents, detailed above, were: (1) the patient's elbow laceration in June 2010; (2) the gurney safety latch failing to catch in March 2011; and (3) the curb strike in April 2011.

The *Wright Line* framework applies here, and I hereby incorporate my findings above regarding union activity and the Respondent's knowledge of it. I likewise incorporate my pre-

[41] P. 8 of GC Exh. 53 was not sent to employees.

[42] This is not alleged as a threat in violation of Sec. 8(a)(1), but the evidence does not show that it was based on any reasonably calculated objective facts, and it would reasonably be understood as a threat. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969).

[43] The CAP itself instructs future communications to be "professional, respectful, and supportive." The "supportive" requirement, in the context of Schlegel's union leadership and his past discipline for showing disagreement with the bariatric stretcher policy, strikes me as coercive.

vious findings regarding animus. Other evidence of animus around the time period relevant to the PIP include the Respondent's April 2011 actions of unlawfully prohibiting employees from wearing pins, including Teamsters pins, as discussed below.

In addition, Riensche undertook an audit of Schlegel's attendance from April 2010 through March 2011. Though Riensche reviews his employees' attendance monthly and had disciplined other employees for attendance, this was the first employee for whom he examined attendance over the course of a year. (Tr. 880–881, 909–910; R. Exh. 30.) Boxman testified that Riensche selected Schlegel for the annual attendance audit because Schlegel was previously disciplined for tardiness, and the annual review was part of the CAP. (Tr. 1026–1027.) Riensche offered no explanation of why he selected Schlegel for the audit. An annual attendance audit is not mentioned in the CAP. In any event, as explained above, the CAP's imposition of greater compliance requirements for Schlegel's attendance, even though he had no additional infractions of excessive tardies in a 90-day period per his October 13 counseling, was pretext for retaliation. Moreover, Boxman's testimony that other employees did not have an absenteeism or tardiness issues, thus justifying Riensche's audit of Schlegel, is patently false. Though attendance and the PIP are somewhat attenuated, the audit occurred during the same general time period. Weeks referenced the annual attendance audit when recommending Schlegel's termination in April, and Riensche referenced it when recommending Schlegel's termination in May.[44] The attendance audit demonstrates that the Respondent was taking novel steps to find fault with Schlegel in and around the time he received the PIP.

The Respondent asserts that the PIP was justified because Schlegel was responsible for three patient injuries within a year. Schlegel was not disciplined for the patient elbow laceration in June 2010. He voluntarily reported it to his supervisor, and it did not engender a patient complaint. Riensche was not Schlegel's supervisor when it occurred and had no involvement with it. (Tr. 885.) Particularly in light of the attendance audit, I find it more likely than not that Riensche discovered it in connection with the Respondent's efforts to build a case to support Schlegel's termination. This finding is bolstered by the fact that in his May 16 recommendation to terminate Schlegel, Riensche referenced Schlegel cursing at the pedestrian in May 2009, even though this remote event was resolved at the time, and was not cited in either previous CAP. See *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988) (The respondent's probe "into remote events that were satisfactorily resolved at the time to show unsatisfactory conduct" reflects on genuineness of motivation.).

Schlegel was not contemporaneously disciplined when the gurney safety latch failed to catch in March 2011. As the PIP itself indicates, there were no previous attempts at coaching or counseling. (GC Exh. 32.) Chan was never disciplined for the gurney latch incident, even though she was operating the side of the gurney where the latch failed to catch.[45] Weeks' reason for this was that it was an isolated incident. (R. Exh. 25, p. 35.) Chan, however, had already received a written reprimand and a suspension in 2010 for *two separate incidents* that involved a lack of situational awareness. Chan later received a PIP in August 2011 for falling asleep at the wheel and hitting the highway median, and erroneously telling a family member a patient had died. The gurney incident was not referenced in Chan's PIP. (R. Exh. 34.) Thus Weeks' stated rationale for not disciplining Chan fails to withstand scrutiny. Finally, Zimmer determined that the patient did not sustain a head injury, and informed the facility to take him off the injury watch list. (Tr. 828–829.) In light of the foregoing, the Respondent's reliance on an injury that a supervisor determined did not occur to single out Schlegel for discipline strongly compels a finding of pretext.

As for the curb strike, there is also evidence of pretext. First, Weeks attempted to fault Schlegel for under-reporting the impact of the curb strike. He testified that Schlegel told Supervisor Roth he had just "tapped the curb." (Tr. 950.)

Yet Roth's email to Weeks reflects that Schlegel told him he struck the curb, and "[w]hen the tires hit the curb the whole ambulance was jarred from the impact." (R. Exh. 25, p. 26.) In Schlegel's incident report, he likewise noted that the "patient was jostled hard." Weeks' attempt to fault Schlegel for minimizing the impact of the strike is plainly disingenuous.

Weeks also faulted Schlegel for minimizing the patient's injury. A close look at the facts, however, fails to support this. Chan assessed the patient with discomfort in her left hip due to recent hip replacement surgery at 8:30 a.m., prior to the start of transport at 8:39 a.m. At the time the ambulance struck the curb, the patient had no complaints. She later complained of hip pain, but was uncertain whether it was just her normal hip pain, was from the normal bouncing from transport, or from the curb strike. Chan assessed no abnormalities aside from tenderness from her surgery. In other words, Chan assessed no additional injury. (GC Exh. 34.) Schlegel was driving, and the fact that she did not tell Schlegel about the patient's complaint of hip pain makes sense, as the patient could not tell whether it was just her ordinary pain and Chan's exam findings were the same as her initial assessment. According to Lee's notes, the patient's husband did not complain about his wife having hip pain, but instead said she had back pain since the accident, and he asked to have the bill waived.[46] He also stated that his wife "flew up on the gurney." (R. Exh. 25, p. 25.) Chan was not interviewed about the incident. Her EMS report reflects that the patient was well restrained and did not fall out of the gurney

[44] It is not clear whether or not the tardies for which Schlegel was disciplined in October 2010 factored into this calculation.

[45] The Respondent points out that, as the senior paramedic, under the Respondent's policies, Schlegel was responsible for the ambulance. The evidence shows, however, that Andrew Brookman, a junior paramedic, hit a building and did not report it. He received a reprimand for it. The senior paramedic was counseled but not disciplined because she was not the one driving. (GC Exh. 54; Tr. 971–972.) In addition, the senior paramedic and junior paramedic who were involved in an injury resulting from a gurney tip both received the same discipline, letters of counseling. (R. Exh. 27, pp. 18–19.)

[46] Lee's notes from the call state the patient was transferred to the ICU in May, but do not give a reason.

at any point, and it makes no mention of back pain. (GC Exh. 34.) Chan was the person closest to the patient during the transport, and the only person to view the impact on the patient and to assess her. The failure to interview her as part of a good-faith in-depth investigation is baffling and highly indicative of pretext. *Clinton Food 4 Less*, 288 NLRB at 598. Schlegel's PIP was for patient injuries. Therefore Weeks' post hoc rationale for the Respondent's failure to interview Chan, i.e., she was attending to the patient and was not driving, does not hold up. (R. Exh. 25, p. 35.)

Next, though no evidence was presented on whether hitting standing water would serve as some sort of mitigating factor, precipitation the day of the curb strike is relevant for credibility and to show pretext. Chan and Schlegel both testified it was raining. Weeks, who said he spoke to the patient's husband on an unspecified date, said the husband told him there was no standing water anywhere.[47] (Tr. 951.) Lee's notes of her May 5 call from the husband differ, and report that the husband stated he did not think there was enough water in a puddle in the tunnel to cause the ambulance to strike the curb. Weeks testified that he and other unidentified individual(s), out of curiosity, looked at the national weather service report for that day and only 4/1000 inch of rain fell during the 24-hour period before the incident. (Tr. 951–952.) The National Weather Service's report on rainfall for the date in question, however, shows that in the 2 hours preceding the transport, there was 0.29 inch of rainfall, and that it had rained steadily since midnight.[48] (GC Exhs. 64, 65.)

Finally, there is evidence of more lenient treatment of another paramedic. Andrew Brookman made multiple clinical errors along with other transgressions between July 2009 and March 2011. On July 23, 2009, while still a junior paramedic, he hit a restaurant's gutter with his ambulance, causing damage to the restaurant and the vehicle. He failed to report this incident and received a reprimand when it was discovered. As a senior paramedic in November 2009, Brookman applied the wrong protocol to a cardiac patient, resulting in her death. His senior paramedic status was suspended. Around June 11, 2010, having regained his senior paramedic status, Brookman administered the wrong dosage of the medication lidocaine to a patient. He was sent for training, was relieved of primary duty for cardiac calls, and was warned that further infractions regarding patient treatment could result in revocation of his senior status. In July 2010, Brookman improperly activated emergency life flight transport for a patient who had not shown signs of life for about an hour. No action was taken. In March 12, 2011, Brookman received a coaching memorandum when he failed to use a backer, resulting in an accident.[49] (Tr. 854–855, 994; GC Exhs. 55–58.) Brookman only received temporary revocation of his senior paramedic and a CAM despite his repeated errors.

In light of the evidence above, I find the Acting General Counsel has established that the Respondent violated Section 8(a)(1), (3), and (4) of the Act as alleged.

4. Schlegel's August 2011 corrective action memorandum

The complaint allegations in paragraphs 10(b) and (c), 17, and 18 state that on or about August 1, 2011, James and Riensche issued Schlegel a Corrective Action Memorandum; and on or about August 8, 2011, Weeks increased the level of discipline to a Corrective Action Plan, in violation of Section 8(a)(1), (3), and (4) of the Act.

The *Wright Line* analysis applies here, and I incorporate my findings above regarding Schlegel's union activity, the Respondent's knowledge of it, and animus.

The alleged August 8 CAP is not in evidence and the Acting General Counsel does not argue that it was issued. I therefore recommend dismissal of complaint allegation 10(c).

The Respondent's stated rationale for issuing Schlegel the CAM is that he and his partner, Watkins, were parked more than .2 miles from their assigned post, and he did not notify dispatch of this. The evidence overwhelmingly establishes that this was used as a pretext to discipline Schlegel. According to Boxman and Snyder, it is permissible to post .2 miles away from the intersection that is the official posting site. The evidence, detailed above, shows that employees, including Snyder, routinely did not abide by this parameter, and/or were unaware of it. Snyder and other employees posted .61 miles from post 13, and Snyder considered this to be on-post. (Tr. 160–163, 235, 744; GC Exhs. 37–40.) While Snyder may have been trained and trained others to park within .2 miles of the assigned post, her practice at post 13 shows that this training was not strictly enforced.

Olsen, who worked for Metro-West from July 24, 2010, until November 30, 2011, observed that nobody ever parked exactly at the assigned post, and FTO Mark Francum had told him it was okay to post within a mile of the posting location.[50] Olsen sometimes parked at a Quik Mart about a mile from post 1. I credit Olsen's testimony, based on his confident, open and straightforward demeanor. He left Metro-West voluntarily to pursue another job, and is a completely disinterested witness.

[47] Weeks' testimony of his conversation with the patient does not reference any date. His account is somewhat confusing. Weeks testified he received a call from the patient's husband wondering why nobody from the Respondent had contacted him because he had told Schlegel to report the incident and have someone from the Company call him. Lee's May 5 notes document the husband calling to complain about the transport, and do not reference the husband stating that he talked to Weeks. From Weeks' testimony, it appears the call to Lee preceded the call to Weeks. (Tr. 950.) Lee's notes document that the patient told her he had advised Schlegel he needed to report the incident to the Company. They do not, however, state that Schlegel also told the husband that someone from the Company would contact him. Lee's notes do not hint that the patient had expected a call. If the patient was concerned about this, it is extremely odd that he would not raise it with the supervisor he talked to first.

[48] I took judicial notice of the National Weather Service report for the date in question. The Respondent's counsel was shown an unredacted prior to the Acting General Counsel admitting a copy with the date redacted. (Tr. 1024–1025.)

[49] The Acting General Counsel requests that I draw an adverse inference based on the Respondent's failure to produce accident reports. (GC Br. 55.) Although it may be warranted, because I can base my decision on the evidence presented, I find it unnecessary to draw an inference.

[50] Olsen's hearsay testimony about Francum's comments are corroborated by other evidence that employees regularly posted more than 2 miles from the official intersection, and I therefore credit it.

Current employee Watkins also testified that he routinely parked at the John Deere facility and did not think it was an issue prior to August 2011 based on his experience parking there with other FTOs. I likewise credit Warberg's testimony based both on his demeanor and because he is a current employee testifying adversely to his pecuniary interests. *Gold Standard Enterprises*, supra; *Georgia Rug Mill*, supra; *Gateway Transportation Co.,* supra.

The confusion over posting is apparent from the documents issued to Schlegel and Watkins. The CAMs define post 1 as "either Station 8 or Fred Meyer" and state that units may post within .2 miles, or approximately two blocks from the assigned post. According to Olsen, Fred Meyer is 3 blocks from post 1. The instructions on the CAM would permit posting .2 miles from Fred Meyer. In addition, the Respondent was aware of employees parking at a Wal-Mart store in Cornelius and, rather than discipline them, merely advised them not to do this. (Tr. 330–331, 970, 993; R. Exh. 3.) In fact, despite knowledge of posting errors, the Respondent did not discipline any other employees for failing to post at the correct location. (Tr. 850.)

The complete confusion and lack of consistent standards regarding where crews could post, the fact that no other employees were disciplined despite the Respondent's knowledge that other employees had been off post, coupled with the evidence of animus, convince me that the Respondent seized on the opportunity to discipline Schlegel. Both Weeks and Riensche referred to the incident in their respective August 11 recommendations to terminate Schlegel. Weeks also embellished the transgression, stating that Schlegel was seen posting more than a mile from where he stated he was. Accordingly, I find that the Acting General Counsel proved that the Respondent violated Section 8(a)(1) and (3) of the Act as alleged.

5. Watkins' August 2011 Corrective Action Memorandum

The complaint allegations in paragraphs 11 and 17 aver that on or about August 8, 2011, James issued Watkins a Corrective Action Memorandum, in violation of Section 8(a)(1) and (3).

In the context of a union organizing drive, discipline of a neutral employee in order to facilitate or cover up discriminatory conduct against a known union supporter violates Section 8(a)(3). *Bay Corrugated Containe*r, 310 NLRB 450 (1993), enfd. 12 F.3d 213 (6th Cir. 1993); *NLRB v. Excel Case Ready*, 238 F.3d 69, 72 fn. 6 (1st Cir. 2001). See also *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd 782 F.2d 64 (6th Cir. 1986) (such employees are "pawns in an unlawful design," and their discipline is unlawful).

I find that Watkins was issued a CAM to facilitate disciplining Schlegel for being off post in August 2011. My finding that the Respondent seized on this opportunity to discipline Schlegel, based on the evidence explained above, leads to the inescapable conclusion that Watkins' discipline was a mere by-product.

6. Schlegel's October 2011 suspension and discharge

The complaint allegations in paragraphs 10(d) and (e), 17, and 18 state that on or about October 26, 2011, Lee suspended Schlegel, and on or about October 26, 2011, and Boxman terminated Schlegel in violation of Section 8(a)(1), (3), and (4).

Again, the Acting General Counsel has met its initial burden under *Wright Line* for the reasons set forth above.

Boxman stated he based his decision to terminate Schlegel on all the events that had occurred, and his determination that Schlegel showed no signs of wanting to improve.

The incident that prompted Weeks' and Riensche's October 27 third recommendations to terminate Schlegel occurred on October 25. That day, Schlegel and his partner Warberg stopped for lunch on their way to pick up a nonemergency patient from the hospital without telling dispatch. Once at the facility, Schlegel spent more than 10 minutes talking to a friend from AMR and delayed informing dispatch they had arrived at the hospital. Supervisor Mathia saw Schlegel at the hospital when he arrived to pick up a patient. Mathia saw that Schlegel was still outside and had not yet picked up the patient, even though Mathia, in the same time period, had retrieved his patient and was leaving the hospital. I find that Mathia's subsequent investigation into Schlegel and Warberg's actions that day was justified. It showed that Schlegel and Warberg failed to contact dispatch before stopping for lunch and delayed in contacting dispatch and retrieving the patient once they arrived at the hospital.[51] The Acting General Counsel asks that I draw an adverse inference based on Mathia's failure to testify. As Schlegel's factual account of what transpired essentially mirrors Mathia's notes, no such inference is warranted.[52]

As evidence of pretext, the Acting General Counsel asserts that employees routinely stopped for food without notifying dispatch. The Respondent points out, however, that the employees had been recently reminded of the need to stay in touch with dispatch, by way of an October 9 operations update and an all-hands meeting employees attended on either October 12 or 19. (R. Exhs. 3–4.) The CAM Schlegel received in August 2011 also reminded him to advise dispatch of any deviation from posting/assignment.

Moreover, the Respondent presented evidence that other employees were disciplined for deviating from assignment without notifying dispatch. Trish Preston and Peter Haslett were each suspended in June 2010, for taking a 33-minute detour to see the "Mystery House of Vortex" on the way back from a patient transport without notifying dispatch.[53] (R. Exh. 30, p. 7, Trish's discipline; Tr. 915–916.) On November 27, 2010, Andrew Talarowski received a counseling for failing to keep dispatch advised of his delayed status. (Tr. 910; R. Exh. 30, p. 2.) Ryon O'Tannor received a CAM on August 24, 2011, for stopping to get food without notifying dispatch, resulting in delay to pick up a customer. (R. Exh. 27, p. 4.) Bob Berdan received a reprimand for being 2 minutes late to pick up a patient after stopping for coffee. Though this was a pickup with a set time, unlike Schlegel's, the action that Berdan was required to correct

[51] Though I find Schlegel's conduct justified Mathia's inquiry, I find the investigation's sole focus on Schlegel, with no mention of Watkins, as further evidence that Schlegel has become a focal point.

[52] I likewise decline to apply an adverse inference based on Lee's failure to testify.

[53] The reference to Preston as a senior paramedic is a typo. (Tr. 916.)

was an unauthorized stop while dispatched to a call.[54] (R. Exh. 27, p. 9.) The Acting General Counsel asserts that the other employees who were disciplined were late to calls or were responding to emergency calls, but this was not the case, as Haslett and Preston's situation shows.

As additional evidence of pretext, the Acting General Counsel also points out that on October 25 Schlegel parked with large Union posters in his car in front of Boxman and Fuiten's office, and the Respondent received a MWA Medicguy Facebook page responding to an employee survey and explaining how the Union could help. There is no evidence that this, or other Union activity, caused the Respondent to send Mathia to watch and report on Schlegel, however. As a supervisor, Mathia looked into and verified what he saw as an infraction, and Schlegel was issued a suspension in a manner consistent with other employees. Even though there is significant evidence of animus, I find, in light of the above, that the Acting General Counsel has failed to prove that Lee's suspension of Schlegel on October 26, 2011, for his lapses in maintaining contact with dispatch on October 25 was pretext for retaliation.

Weeks and Riensche also added Schlegel's failure to submit the report on the dangers of inattentiveness, required by the PIP, as a justification for Schlegel's termination. Schlegel testified that he turned the report in, to Riensche initially and later to Weeks, but he did not retain a copy for himself and the computer he drafted the report on was stolen. (Tr. 891, 1019.) In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950). While I have credited much of Schlegel's testimony, I do not credit his testimony that he wrote and submitted the report. Twice on cross-examination, Schlegel was asked about the content of the report. He paused before responding, and the responses appeared contrived. In addition, Schlegel perceived that he was under the microscope, as evidenced by posts on his MWA Medicguy page as well as comments to supervisors and employees. Under these circumstances, I find it implausible that Schlegel would not have taken the small and simple steps required to ensure he retained a hard copy of the report and/or to ensure he had tangible verification of its receipt.

Although I find that the Respondent did not unlawfully suspend Schlegel based on his failure to maintain contact with dispatch on October 25, and that he had previously failed to turn in the report on the dangers of inattentiveness, the ultimate question before me is whether the Respondent would have terminated him based on these infractions. I find that these two incidents alone would not have resulted in Schlegel's termination.

The Respondent presented evidence that senior paramedic Aric Johnson was terminated on October 1, 2010. Johnson was working with Eliot Day, a junior paramedic. Johnson had concerns about transporting the patient. He panicked, and based on unfounded concerns told Day to "step on it" resulting in Day driving in excess of 90 miles per hour. The Respondent applied a substitution test, and other paramedics were able to find alternative ways to deal with the clinical issue presented. Day was fired initially, but pursuant to a root cause analysis, his termination was rescinded and he received a CAP. (R. Exh. 30, p. 306; Tr. 911–914.) Neither Day nor Johnson reported directly to Riensche, and no supervisor who testified had direct knowledge of the incident.[55] Riensche did not know whether Johnson had received any prior discipline. (Tr. 914, 927.) Aside from not knowing whether this was Johnson's first infraction, Johnson's termination related to his clinical skills as a paramedic. As such, his situation was different from Schlegel's.

With regard to the report on the dangers of inattentiveness, I find that the timing of events strongly suggests Schlegel's failure to provide it, without more, would not have resulted in his termination. The report was due on August 1, 2011. Riensche and Weeks referenced Schlegel's failure to submit the report in their respective recommendations to terminate Schlegel a couple weeks later, along with the other incidents. Schlegel, however, was not terminated until October 27. This timing shows that the failure to turn in the report combined with the other enumerated infractions, even assuming the discipline for them was legitimate, *would* not have resulted in Schlegel's termination because in fact they *did* not. See *Dentech Corp.*, 294 NLRB 924, 956 (1989).

I also find that the October 25 infraction, combined with Schlegel's failure to turn in the report on the dangers of inattentiveness, would not have resulted in his termination. Weeks and Riensche consistently emphasized that several incidents informed their combined and seemingly collaborative requests that Boxman terminate Schlegel. Boxman's testimony that he didn't terminate Schlegel on the first two recommendations because he was a long-term employee who previously had an outstanding record, demonstrates that these two infractions, by themselves, would not have led to Schlegel's termination. Instead, Boxman considered and relied on a combination of all the events and all the previous discipline.

I do not doubt that Schlegel was not his usual self in and around the time of the events at issue in this decision, particularly early on. I understand and appreciate that he received his first admittedly legitimate discipline in years for tardiness before he became involved with the Union's efforts. It is undeniably a common experience in industrial life to see a coworker who is going through personal issues manifest some of the effects of those issues at work. What is also clear, however, is that regardless of what was happening at home, Schlegel was not alone in becoming increasingly frustrated at work. This is evident from the Respondent's decision to implement Just Culture and from the Union's campaign, albeit unsuccessful. I cannot and need not speculate about whether Schlegel would have commented to Riensche in October 2010 about the need for a union if his personal life had not taken the turns that it did. What happened from there is described above and its lawfulness analyzed taking into account the evidence presented.

[54] There is also evidence of discipline for failure to maintain connection with dispatch during 9-1-1- calls, which I find to be of less relevance. Likewise, there is evidence that an EMT basic was disciplined for not being on the air.

[55] Riensche is listed as Day's supervisor in R. Exh. 30, but he testified that Day was not his direct employee at the time. (Tr. 914.)

Based on the foregoing, I find the Acting General Counsel has met its burden to prove that but for Schlegel's protected activities, and discipline motivated by these activities, he would not have been terminated on October 27, 2011.

7. Warberg corrective action memorandum

The complaint allegation in paragraphs 12(a) and 17 states that about October 27, 2011, the Respondent, by Weeks and/or Riensche at the Respondent's facility, issued its employee Brent Warberg a corrective action memorandum to camouflage the discriminatory nature of the Schlegel's suspension and discharge, in violation of the Act.

For the reasons set forth above, I find that the Respondent did not issue Warberg a CAM to cover up its discriminatory treatment of Schlegel. First, I note that I have not found Schlegel's suspension to be unlawful. As with Schlegel, I find that Mathia's legitimate investigation revealed an infraction warranting discipline, consistent with how the Respondent has disciplined other employees. Because it was Warberg's first infraction, and the CAM is the lowest level of discipline under Just Culture for behavioral lapses, I find it was legitimately issued. The Acting General Counsel has not proven that Warberg's discipline was a pretext to justify disciplining Schlegel, in line with my findings above. Accordingly, I recommend dismissal of complaint allegation 12(a).

B. Prohibition on Wearing Pins

The complaint allegation in paragraphs 8 and 16 states that on April 14, 2011, the Respondent began enforcing a rule about employee associations to prohibit employees from wearing union pins in violation of Section 8(a)(1) of the Act.

In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945), the Supreme Court held that employees have a protected right to wear union buttons at work. This right is balanced against the employer's right to maintain order, productivity, and discipline. The Board has struck this balance by permitting employers to prohibit employees from wearing union insignia where the employer proves that "special circumstances" exist. Id. at 797–798; see also *Sam's Club,* 349 NLRB 1007, 1010 (2007). It is firmly established that "substantial evidence of special circumstances, such as interference with production or safety, is required before an employer may prohibit the wearing of union insignia, and the burden of establishing those circumstances rest[s] on the employer." *Government Employees*, 278 NLRB 378, 385 (1986). "The Board has found special circumstances justifying the proscription of union insignia when its display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules for its employees." *United Parcel Service*, 312 NLRB 596, 597 (1993*),* enf. denied 41 F.3d 1068 (6th Cir. 1994) (citing *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982)). A rule based upon special circumstances must be narrowly drawn to restrict the wearing of union insignia only in areas or under circumstances which justify the rule. *Sunland Construction Co.*, 307 NLRB 1036 (1992). Customer exposure to insignia is not, by itself, a special circumstance, nor is the requirement that an employee wear a uniform. *United Parcel Service,* supra.

Boxman testified, as set forth in the statement of facts, that there was a lot of scuttlebutt about the pins, and controversy among employees who wore union pins and antiunion pins. This prompted management to look at the policy manual and permit only pins from professional organizations associated with the Company. Boxman's generalized testimony, however, is insufficient to carry the Respondent's burden. In *Mead Corp.*, 314 NLRB 732 (1994), the full Board considered whether the employer could ban employees from wearing buttons that said "no scabs" in support of striking workers and insignia opposing a voluntary program the company had implemented. In upholding the judge's decision that the employer had failed to establish special circumstances, the Board weighed the employees' rights to engage in activities protected by Section 7 against the company's right to maintain discipline and production. The Board noted, "for example, if there are threats of misconduct, an employer could take steps against the specific persons who uttered the threats" but concluded that "where, as here, there are no such threats, the Respondent cannot implement broad restrictions which interfere with the Section 7 rights of the employees." Id. at 734.[56] The Board rejected the company's arguments that permitting employees to display the insignia might worsen ill-will or harm labor relations, noting that the record was devoid of evidence of production deficiencies or discipline problems as a result of the employees' display. See also *Caterpillar, Inc.*, 321 NLRB 1178, 1180 (1996) (assertion that the employees' message '"could not help but promote disorder, undermine production, and foster a lack of discipline' is no substitute for evidence. It must be remembered that employees' statutory rights are at stake here, and we are unwilling to sacrifice them on the basis of nothing more than sheer speculation").

While there is no doubt the Respondent's employees, in the midst of the union campaign, took respective sides to show fervent support of or opposition to the Union, the evidence fails to show that any scuttlebutt or controversy arising from the buttons created a special circumstance justifying intrusion on employees' statutory rights.[57]

In its brief, the Respondent asserts that policy 701 is concerned with maintaining Metro-West's public image. There is no record evidence to support this, however. Policy 701, entitled, "Employee Associations," is within a section entitled, "Community Relations and Public Information." Within that section, policy 704 is entitled, "Preservation of Company Image." Policy 704 is not in evidence, and therefore it is not clear whether this provision prohibits union or other insignia.[58] Likewise no evidence of record shows whether or not custom-

[56] As a corollary, Boxman testified an employee had put the union pin through the Metro-West patch on his uniform, and the Company addressed this. There is no evidence to suggest this individual instruction was insufficient to cure the individual transgression.

[57] The Acting General Counsel's reference to *United Aircraft Corp*., 134 NLRB 1632, 1638–1640 (1961), is misplaced. The finding relied on in the brief is an ALJ decision the Board overturned.

[58] The employee manual provision governing uniforms does not mention pins. (R. Exh. 7, p. 11.)

ers noticed the pins, much less whether the pins bothered or alienated customers. What is clear, however, is that the Respondent has not presented evidence to prove that it enforced policy 701 because the union pins at issue unreasonably interfered with a public image the Respondent has established as part of its business plan. *United Parcel Service,* supra.

The Respondent cites to *W San Diego*, 348 NLRB 372, 373 (2006), as support that employers may prohibit union and other pins while permitting pins issued as part of the employer's uniform. That case is distinguishable from the facts here. First, the prohibition in *W San Diego* extended only to public areas. Moreover, the button was 2 x 2-square inches, and read, "JUSTICE NOW! JUSTICIA AHORA! H.E.R.E. LOCAL 30," and were more intrusive in size and color than the employer's uniform pin. Id. at 373, 380. Finally, the company in *W San Diego,* a hotel chain, presented a plethora of evidence (absent here) that the judge relied on to find that the pins were inconsistent with a legitimate business model the company relied on to compete with other hotels. Id. at 380. The evidence, including Boxman's testimony, does not hint at a similar public image concern, nor does the action of broadly prohibiting employees from wearing pins rather than narrowly tailoring the prohibition to public areas.

The Respondent also looks to *Albis Plastics*, 335 NLRB 923, 924 (2001), where the Board found special circumstances permitted a ban on decals employees wore on their hardhats. The employees in that case, however, worked in an enclosed industrial facility with visibility limitations. The employer proved that the hardhats counteracted the visual impediments, and the decals would impair safety by reducing the hardhats' visibility. There is no record evidence of such safety concerns here.[59]

The Respondent notes, and it is undisputed, that policy 701 is not discriminatory on its face and was not promulgated in response to union activity. The Acting General Counsel challenges the rule's application, not its genesis or its content. The Respondent further notes that it began enforcing the rule to prohibit all pins, including antiunion pins. The right to wear union pins, however, is protected by Section 7. The banning of other pins does not dilute this right where, as here, there are not special circumstances.

Based on the foregoing, I find that the Respondent violated Section 8(a)(1) of the Act when it enforced policy 701 to prohibit employees from wearing union pins.

C. Alleged Surveillance, Interrogation, and Threat

1. Alleged surveillance

Complaint paragraphs 13 and 16 allege that the Respondent conducted unlawful surveillance of employees engaged in union activities and/or to discover employees' union and/or protected concerted activities.

The test for determining whether an employer engages in unlawful surveillance or whether it creates the impression of surveillance is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB,* 682 F.2d 98 (3d Cir. 1982)). The Board has consistently held that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. See *Fred'k Wallace & Son, Inc*., 331 NLRB 914, 915 (2000). For example, in *Metal Industries*, 251 NLRB 1523, 1523 (1980), the Board found no unlawful surveillance of employees where the employer had a longstanding practice of going to the employee parking lot to say goodbye to its departing employees at the end of the workday. The employer's observance of the employees' Section 7 activity was inseparable from its regular and noncoercive practice. See also *Wal-Mart Stores*, 340 NLRB 1216, 1223 (2003).

Employers may not, however, "do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." *Loudon Steel, Inc*., 340 NLRB 307, 313 (2003); see also *Partylite Worldwide, Inc*., 344 NLRB 1342 (2005); *Arrow Automotive Industries,* 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982); *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190 (2007). The Board's analysis thus focuses on whether the observations were ordinary or represented unusual behavior. *Aladdin Gaming, LLC*, 345 NLRB 585 (2005), rev. denied 515 F.3d 942 (9th Cir. 2008). Even unusual observation or enhanced surveillance will not violate the Act, however, where the employer shows it was instituted for legitimate reasons, such as security. *Lechmere, Inc.*, 295 NLRB 92 (1989), enfd. 914 F.2d 313 (1st Cir. 1990), revd. on other grounds 502 U.S. 527 (1992).

a. November 10 in the parking lot

It is impossible to discern from the record the precise chain of events on the evening of November 10, 2011. This is not surprising, considering each individual has his or her own unique perspective, and the events occurred months ago. I have resolved material discrepancies below based on my credibility determinations and my assessment of the weight due to the evidence.

(1) Johnson

As a supervisor for the wheelchair department, Jocelyn Johnson was responsible for conducting periodic inventory of the wheelchair vans. Though Johnson did not testify, her contemporaneous notes from November 10 state that she was in the parking lot conducting inventory that evening. Lundin's recollection that Johnson approached him with a work-related question about what was in his van, and his assumption that she was conducting inventory, support Johnson's notes. Lundin also recalled that when he told Johnson he was talking to employees about the Union, she said she was not stopping him. (Tr. 415–416; R. Exh. 16.) There is evidence in Zimmer's notes that she was "walking the lots" with Johnson. (R. Exh. 26.) I find that even if this was the case, Johnson's presence in the parking lot was not out of the ordinary, and she did not engage in coercive activities.

[59] The Respondent also cites *Burger King Corp. v. NLRB,* 725 F.2d 1053, 1055 (6th Cir. 1984), which declined to enforce the Board's order finding that the employee's contact with the public was not a special circumstance. *Burger King Corp.,* 265 NLRB 1507 (1982).

The Acting General Counsel asks that I draw an adverse inference based on Johnson's failure to testify. I decline to do this, as Lundin's testimony supports the conclusion that Johnson was conducting inventory in the parking lot on November 10, and the Acting General Counsel has not introduced contrary evidence that persuades me otherwise. The Acting General Counsel's argument is not enhanced by the fact that Johnson was carrying a clipboard. She was conducting inventory, and there is no record evidence that the clipboard had any relation to any union activity of employees. See *Riley-Beard, Inc.*, 271 NLRB 155, 157, 164 (1984). I find, therefore, that the Acting General Counsel has failed to prove that Johnson's presence in the parking lot on November 10, 2011, was unusual or out of the ordinary. Accordingly, I recommend dismissal of complaint paragraph 10(c).

(2) Fairbanks

Fairbanks, as wheelchair department manager, is in the parking lots overseeing his employees and vehicles on a daily basis. Fairbanks testified that on the evening of November 10, he was in the parking lot talking with Johnson, who was one of his subordinate supervisors, as she was doing inventory. Johnson's notes from November 10 also reflect that Fairbanks and Johnson were doing inventory checks. Because the lighting in the back parking lot is poor, Fairbanks lit the area with a vehicle's headlights so Johnson could see. Fairbanks testified this was his practice during the winter months when it was dark in the evenings.

The Acting General Counsel argues that Fairbanks' presence in the parking lot was unusual that evening because Lundin had never seen him there at the end of his shift before. The Acting General Counsel also points to Lundin's testimony that he saw Fairbanks just standing in the middle parking lot when he came in from his shift, and he then saw Fairbanks between the middle and back parking lots after he clocked out. While I do not discredit Lundin's testimony, I find that, without more, it fails to establish that Fairbanks' presence in the parking lot that evening was unusual. The fact that Lundin twice observed him standing for an unknown duration does not materially conflict with Fairbanks' testimony that he was in the parking lot for purposes related to his job as wheelchair department manager. Moreover, even though Zimmer's notes reflect that she walked the lots with Fairbanks on November 10, I find that Fairbanks' actions were in line with his duties as wheelchair department manager. The Acting General Counsel asks for an adverse inference based on Fairbanks' failure to refute testimony that he stood in the parking lot for an extended time period before Johnson joined him. I find no such inference is warranted, as the Acting General Counsel did not establish what Fairbanks ostensibly failed to refute. Accordingly, I recommend dismissal of complaint paragraph 10(b).

(3) Boxman, Zimmer, and Riensche

As detailed above, VST Twyla Wells complained about someone hiding in the bushes on November 9. Zimmer testified that on November 9, Mosso complained to her that Lundin and Melissa Morgan were harassing "them" while they were working. Zimmer's notes regarding this conversation, however, attribute the harassment only to Lundin, with no mention of Morgan, and reflect that Mosso complained that Lydia Murzea and someone named Anthony felt harassed. The only incident noted concerning Anthony was that he reportedly brought Mosso a union card Lundin had given him. Zimmer's notes further reflect that Mosso told her "they" tell Murzea to move to another parking space, impeding her work progress, and walk in between the vans and "startle" her. Murzea provided her own account, which states that the "union supporters" stood in the middle of the lot impeding her in the ability to move about efficiently, have motioned her to choose another spot so they can park together, and have approached her during her shift to ask if she would like to support their cause. Murzea does not name Lundin or any other union supporter, and does not state she was "startled" by Lundin or any other union supporter.

Turning to November 10, there is not a single-firsthand account from any witness about any union activities other than Lundin's protected solicitation efforts.[60] Riensche recalled that the complaints were on November 9. (Tr. 906.) Zimmer testified at the hearing and the Respondent submitted notes she took about the events of November 10. Zimmer's testimony at the hearing and her notes, however, conflict in numerous ways. Zimmer testified she went to the parking lot to ask Johnson a question about inventory. She recalled seeing Lundin but she did not approach him. She then went into the building and talked to Riensche and Boxman about "the activity in the parking lot, and that we'd received some complaints about people being in the parking lot, like the gentleman the night before who was out in the bushes, and just overall safety of our crews." When prompted, Zimmer stated that Mosso had reported that Lundin and Morgan were harassing people by not letting them park and talking to them while they were working. (Tr. 833–835.) After this testimony, Zimmer was shown her notes. The notes state that she "walked the parking lot" at different times on November 10. When she was walking the back lot, Mosso stopped her and told her Lundin was outside "cornering people to talk to them about organizing." She then walked through the back lot, saw Neil and said, "hello." Following this, she walked back inside, told Riensche and Boxman that Lundin was outside, and Boxman asked her to "do another walk" with him. (Tr. 838; R. Exh. 26.)

The Respondent did not call Mosso as a witness. Moreover, the record does not contain any statement from him about what occurred November 9 or 10, despite Zimmer asking him to draft one. In light of the inconsistencies above and Mosso's failure to testify or submit a statement, I find Zimmer's oral and written accounts of what Mosso told her on November 9 and 10 to be unreliable hearsay and I assign them no weight except where corroborated by competent evidence.

Boxman's testimony also differs from Zimmer's accounts and cannot be squared with other record evidence. When Boxman was asked what complaints he received the evening of November 10, he replied in the following obscure manner:

[60] Handing out union cards is considered solicitation, not distribution. See *Stoddard-Quirk Mfg. Co*., 138 NLRB 615, 619 fn. 5 (1962); *Rose Co.*, 154 NLRB 228, 229 fn. 1 (1965).

> Well, they were on the—there was I believe it was 10th, it kind of—the 9th Twyla, it was real close together in time so the 9th is when Twyla brought a concern in and on the 10th it was just big talk. When I say big talk what mean by that is just a lot of conversations going on all about it and people saying well, are we safe and you know, we don't feel comfortable going to our cars and then the VST's are coming in and saying well, we can't park the wheelchair vans out here and one VST said, I tried parking by wheelchair van and they wouldn't move and then they waived me off and then they yelled at me and so this kept—this was building kind of throughout the evening on the 10th.

(Tr. 586–587.)

Boxman was next asked if he received any complaints directly from the VSTs and he responded initially that he heard the supervisors talking, but then implied he had spoken with Mosso and "Lidia":

> Q. Okay. And again, did you receive those complaints directly from the VST's?
>
> A. Well, I ended up inquiring because I mean my office sits, you know, in the evening I'm working and there's a lot of noise so I stepped outside my office and said, hey, what's going on and that's when the supervisor was saying, well we're getting all these complaints and then the VST's then just kind of, it was like a flood of complaints and they kind of just let go and started saying all the things that they've been dealing with and apparently they've been dealing with it for a little while but they haven't—I mean, a little while, [d]ays or weeks and it finally got to the point where they couldn't park their vans and they were frustrated and—
>
> Q. And which VST's were telling you about this?
>
> A. Matt Mosso, Lidia, I forget Lidia's last name, but Lidia, she's the one that said she was really yelled at.

(Tr. 587–588.)

Boxman next testified that he walked out to the back parking lot with Paul Austin because there was a lot of noise, and he wanted to see what was going on. Boxman and Austin saw Lundin out in the parking lot alone, and it was quiet. As Boxman was walking back to his office, he heard Hawkins yell at Lundin to leave him alone.[61] Boxman provided the following reason for his second trip to the parking lot:

> I went back to my office and tried to do some more work and the talk regarding, actually, a little bit of time had passed and it was—it started up again as far as, I tried to park my van and I was told to move away and I was like, oh, here we go again, let me see what's going on and I walked back out there, out to the back parking lot and I saw Neil still out there.

(Tr. 592.) Boxman went back outside with Riensche and Zimmer, stating:

> They were working and they were listening, they had been hearing this for a little while and they—I said, I'm going to go check it out, well, we're going to go too because there was a lot of curiosity as to what was happening, you know, trying to verify what the VST's are saying, I can't get my work done with—well, let's see for ourselves and try to correct the situation. So they just kind of tagged along.

(Tr. 593.)

Finally, Boxman provided the following reason for his third trip to the parking lot:

> So I went back to my office and some more time had passed, maybe 20 minutes, 25 minutes and it started again where VST's are coming in saying it's happening and they're not letting me and he did say it's Neil Lundin, names were being now produced. Neil Lundin and so J.D. Fuiten who is two—it's the same hallway, just two doors down, was also working and he came out and said, you know, what's going on and because he's been hearing it and he said, you know, this is still going on and he said, well, let's just take a walk out there because either there's something to it or there's not. And so we walked out towards the parking lot and—

(Tr. 595.) Boxman recalled Zimmer and Riensche were still with him. Zimmer's notes reflect she went back to the parking lot with Johnson and then saw Boxman and Fuiten come back outside.

There are numerous problems with Boxman's account. First, Boxman said he and Austin went to the parking lot ostensibly in response to the big noise that was occurring. But neither Fairbanks nor Johnson, who were in the parking lot that evening, described seeing anything out of the ordinary. Moreover, Zimmer's notes from November 10 do not describe any work interference or disruptive behavior by Lundin or anyone else. As for the second trip, I find that it was taken in response to Zimmer seeing Lundin outside soliciting and reporting this activity to Boxman and Riensche, as reflected in her contemporaneous notes. Zimmer's notes are consistent with Johnson and Fairbanks' accounts that they saw Lundin soliciting that evening, and their failure to report or testify about disruption of work in the parking lot on November 10. Finally, Boxman's justification for his third trip, i.e., that names, specifically Lundin's name, were now being produced with regard to the VSTs' complaints, does not make sense. As noted above, Zimmer told Boxman that Lundin was outside soliciting, which prompted Boxman's second trip. There is no evidence anyone complained that Lundin disrupted the VSTs' work on November 10 at any time, much less specifically between Boxman's second trip and the third trips that evening.

I find that Boxman, Zimmer, and Riensche's repeated visits to the parking lot on November 10 exceeded mere passive observation. I do not discount the fact that Wells and Murzea complained, and I appreciate that management may not simply ignore such complaints. None of the complaints established through competent evidence were directed at Lundin, however, and there is likewise no evidence of any specific disruptive or

[61] Lundin disputes this, and opined that Hawkins did not want to be seen engaging in union activities with all the supervisors in the lot. Zimmer recalled Hawkins stating loudly, "I do not want your card." Hawkins did not testify and there is no evidence that he complained to anyone that his work was being interfered with or that he felt threatened.

threatening activity on November 10. As noted, Fairbanks and Johnson, who supervised the VSTs, were already out in the parking lot and did not report anything disruptive. Finally, Boxman's suggestion to Lundin it was time for him to go home, and Fuiten's ultimate directive to Lundin to leave the parking lot, discussed below, when Lundin was admittedly in the parking lot alone and not observed to be causing any problems, negate any legitimate claim that the Respondent acted out of concern for employee security or work flow. See *Impact Industries*, 285 NLRB 5 fn. 2 (1987).

I further find the email Boxman sent to employees on November 10 likewise constitutes unlawful surveillance, because it instructs employees to inform a manger or supervisor if they see people lingering in and around the parking areas. The instructions are not limited to reporting things like workflow disruptions or suspicious bush lurkers. "[G]iven as they were in the context of a current and ongoing preorganizational effort," I find the instructions "convey the proscribed chilling effect." *Kenworth Truck Co*., 327 NLRB 497, 500 (1999).

The Respondent points to the fact union supporters were permitted to solicit in the parking lot both before and after November 10. This does not take away the coercive nature of what occurred on November 10, however. Accordingly, I find that the Acting General Counsel proved that Boxman, Zimmer, and Riensche engaged in unlawful surveillance as alleged.

b. Snyder and Fairbanks November 17 in the crew room

Paragraphs 13(f) and (g) and 16 of the complaint allege that Snyder and Fairbanks engaged in unlawful surveillance in the crew room on November 17, 2011. I find that the Acting General Counsel failed to prove this allegation. Both Snyder and Fairbanks testified that they are routinely in the crew room throughout the workday, and they pass through it on their way to other parts of the premises. As the Respondent points out, there are numerous reasons for supervisors to walk through or spend time in the crew room. (R. Br. p. 51.) Neither Lundin nor any other witness identified anything unusual about their presence, and in fact Lundin thought Snyder appeared to be looking for someone. The Acting General Counsel points out that Fairbanks did not explain his presence in the crew room on November 17, but rather testified only that he is there frequently. Absent a showing that Fairbanks' presence in the crew room was unusual, however, the Respondent is not required to justify its occurrence on November 17. There is no evidence to establish that either Snyder or Fairbanks was in the crew room to observe union activity. Accordingly, I recommend dismissal of complaint paragraphs 13(f) and (g).

2. Alleged no loitering rule

The complaint, at paragraphs 14 and 16, alleges that the Respondent promulgated, maintained, and enforced a rule prohibiting employees from loitering on its property when not scheduled to work, in violation of Section 8(a)(1) of the Act.

a. Promulgation

On November 23, Fairbanks sent an email to the wheelchair division employees, stating that in the past 3 weeks he had received complaints about increased "agenda promoting" (admittedly union activity) in the parking lots, he was going to enforce "the existing practice of not loitering in the workplace, or on the property, when you're not scheduled."

The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. Id. The question of whether a rule or policy violates the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity. *Firestone Tire & Rubber Co.*, 238 NLRB 1323, 1324 (1978).

In *Lutheran Heritage Village-Livonia*, supra, the Board found that a rule prohibiting "[l]oitering on company property (the premises) without permission from the Administrator" violated Section 8(a)(1) of the Act because it would reasonably chill employees in the exercise of their Section 7 rights. Id. at 655. In so finding, the Board explained that "employees could reasonably interpret the rule to prohibit them from lingering on the [r]espondent's premises after the end of a shift in order to engage in Sec[tion] 7 activities, such as the discussion of workplace concerns." Id. at 649 fn. 16. Accordingly, I find the wheelchair employees would reasonably construe Fairbanks' email to prohibit them from engaging in Section 7 activity on the Respondent's premises during nonworking hours.

Fairbanks testified he sent the email in response to employee complaints over the preceding 3 weeks about the union organizers interfering with employees' efforts to do their work and move about the parking lot. The email itself only references "agenda promoting" not interference with work. Murzea reported that Boxman's November 10 email had resolved the matter, and Boxman received no further complaints about the Union interfering with the wheelchair employees' work in the parking lots following November 10. There is no evidence that any employees who allegedly interfered with the work of the wheelchair employees were disciplined for violating prior directives. Moreover, Mathia's November 22, 2011 "parking lot safety check" does not reference any employee complaints, yet it clearly states that Mathia told Lundin and Morgan, who were engaged in organizing activities, to leave. (GC Exh. 9.)

Even if Fairbanks' email was aimed at eliminating work interference, it was overly-broad. As the Board held in *Tecumseh Packaging Solutions, Inc.*, 352 NLRB 694 (2008), while employers may maintain rules and policies tailored to legitimate

business concerns it may not "maintain overbroad no-loitering rules that reasonably tend to chill the exercise of Section 7 rights." Telling employees that because of complaints about "agenda promoting" in the parking lots, he was going to enforce "the existing practice of not loitering in the workplace, or on the property, when you're not scheduled" clearly would have such a chilling effect.

The Respondent argues that the rule was valid under *Tri-County Medical Center*, 222 NLRB 1089 (1976), because it limited access solely with respect to the interior of the plant and other working areas, it was clearly disseminated to all employees, and it applied to off-duty employees seeking access to the facility for all purposes. Specifically, the Respondent avers that the rule was limited to working areas because it instructed wheelchair employees not to loiter in the workplace or on the property, and it is undisputed that the wheelchair employees perform work in the parking lot. The email, however, is not limited to the parking lot. It would reasonably be construed as prohibiting activity anywhere, including the crew room, restroom, admin parking lot, or any other nonwork areas.[62] Moreover, as discussed fully below, the parking lot is, at best, a mixed use area. As such, the Respondent's argument is unconvincing.

The Respondent also asserts that Fairbanks never enforced the rule. The Respondent did not present evidence that he or anyone else with authority over the employees in the wheelchair department rescinded the rule, however. Fairbanks testified that he erred by stating Metro-West had an existing practice prohibiting loitering in the workplace, but again, there is no evidence he, or anyone else with authority over the employees in the wheelchair department, communicated this to the employees. While he may not have enforced it, I find nonetheless that the Respondent, through Fairbanks, promulgated and maintained the rule in violation of Section 8(a)(1).

b. Enforcement

The Acting General Counsel asserts that the Respondent enforced the rule against loitering by the specific individuals on the specific dates referenced in the complaint. As an initial matter, I must point out that the alleged enforcement violations predate Fairbanks' promulgation. Though the Acting General Counsel did not plead the enforcement allegations artfully (at least in hindsight), the Respondent was on notice of the dates, the individuals, and the basic substance of the claim, and the parties fully litigated the matter. I therefore will decide the allegations in paragraph 13(c), not as violations of Fairbanks' later promulgated rule, but as violations of the Respondent's then-current rule regarding union activity Boxman articulated in his testimony. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *HiTech Cable Corp.,* 318 NLRB 280, 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997). As such, the Respondent's rule was to permit union activity as long as it does not interrupt the flow of work and occurs while the employees are off the clock in nonworking areas. (Tr. 588–889.)

[62] I also find it was enforced to preclude loitering for union activity and not all activity.

An employer has a right to impose some restrictions on employees' statutory right to engage in union solicitation and distribution at the workplace. The law distinguishes between oral solicitations and distribution of literature. Solicitations involve the organizer approaching an employee or group of employees to talk about the union, and often involve the organizers asking employees if they want to sign a union card. This can involve a back-and-forth, with questions and answers, and as such the employer can require that this occur only when all involved in the discussion are off the clock. The Supreme Court has agreed with the Board, however, that as long as the employees are not on the clock, solicitations may occur anywhere, including in work areas. *Republic Aviation Corp. v. NLRB,* 324 U.S. at 802–803 (1945); *Our Way, Inc.,* 268 NLRB 394 (1983). Distribution, by contrast, simply involves handing employees literature, which can be read at a later time. Because distribution involves handing out flyers, pamphlets, and the like, which can create clutter and pose a hazard to production, employers may lawfully prohibit distribution in working areas of its premises. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 620–621 (1962).

(1) Boxman and Fuiten on November 10, 2011

As detailed above, on November 10, Lundin was in the parking lot after his shift soliciting for the Union. (Tr. 710.) Lundin testified as follows:

> They—Larry Boxman came—they walked over to me, and Larry Boxman came to talk to me with—and Kevin and Melissa were kind of on opposite sides around us. And Mr. Boxman asked don't you think it's time for you to go home. And I said no. And he said don't you think it's time for you to leave. I said no, I'll be out here a bit longer.
>
> . . . .
>
> He said that they had also—and I said—I told Mr. Boxman that I was not the one causing the disruption the day previous and that I report any kind of suspicious activity if saw any. And Mr. Boxman inquired if I would like to go back into his office to talk about it. And I said no, I was more comfortable out in the lot.

(Tr. 419–420.) Boxman testified he did not ask Lundin to leave the parking lot. (Tr. 592, 594.)

Though Boxman never directly ordered Lundin to leave, Lundin's testimony that Boxman twice suggested it was time for him to go home and then invited him to discuss matters in his office is unrefuted. Boxman had two other supervisors with him, and Lundin was by himself soliciting for the Union shortly before the petition was to be filed. Boxman's comments occurred shortly before Metro-West's owner, also in the presence of multiple supervisors, told Lundin to leave. Particularly given this context, I find the comments were coercive from the standpoint of a reasonable employee. See, e.g., *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee).

For the reasons articulated in the discussion of surveillance, I reject the Respondent's contention that Fuiten, who did not

testify, went to the parking lot to address an employee's complaint that Lundin was interfering with his or her work. Moreover, as explained below, Fuiten told Lundin to leave the crew room a week later, although he clearly was not interrupting work flow there. I further draw an adverse inference based on Fuiten's failure to explain why he told Lundin to leave the parking lot. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

Even assuming safety and workflow were the real concerns, however, Boxman and Fuiten's telling Lundin to leave the parking lot still would violate the Act. This is because any restriction must be clearly limited in scope so as not to interfere with the employees' right to solicit their off-duty coworkers on their own time. *Republic Aviation Corp*., supra; *Stoddard-Quirk Mfg. Co*., 138 NLRB at 621. Requiring Lundin to leave rather than simply warning him not to interfere with work in the parking lot is obviously not limited in scope. Under these circumstances, I find that Fuiten's directive compounded and capped Boxman's statutorily proscribed course of conduct.

(2) Fuiten on or about November 17, 2011, in the crew room

In short, Lundin was soliciting in the employee crew room on November 17, 2011, when Fuiten came in and told everyone to leave. Snyder, who testified and was in the crew room that day, did not refute this, nor did any other witness. It is undisputed that employees were permitted to hang out in the crew room to wait for traffic to subside and hang out with coworkers. The Respondent argues there is no evidence that anyone was asked to leave its property on November 17, but this ignores Lundin's unrefuted testimony. Based on the reasoning set forth in the previous section, I find Fuiten's directive violated Section 8(a)(1) of the Act.

(3) Mathia on or about November 22, 2011

On November 21 or 22, 2011, Lundin was in the parking lot after his shift speaking to employees about the Union and handing out flyers. Mathia approached him and told him to leave. Unlike the other allegations, this one involves distribution as well as solicitation. I therefore must first determine whether the back parking lot is a work area.

The rule set forth in *Stoddard Quirk Mfg. Co.,* supra, that an employer may lawfully prohibit employees from distributing literature in work areas, does not apply to mixed use areas. *Transcon Lines*, 235 NLRB 1163, 1165 (1978), affd. in pertinent part 599 F.2d 719 (5th Cir. 1979); *Rockingham Sleepwear*, 188 NLRB 698, 701 (1971). The fact that a work function or functions occur in a given area does not itself render it "work area" under the Board's rules regarding distribution. Rather, the focus is on the quality and quantity of work, whether the work is more than de minimus, and whether it involves production. In *U.S. Steel Corp.*, 223 NLRB 1246, 1248 (1976), the Board considered whether an entire facility and grounds could be considered a work area and found that it could not, stating, "[s]ome work tasks, whether it be cleaning up, maintenance, or other incidental work, are performed at some time in almost every area of every company." See also *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000). The main function of the Respondent's business is to provide ambulance and wheelchair transportation to patients. While the VSTs park vans in the back parking lot, I find this is incidental to the Respondent's main function, and does not convert the back parking lot into a work area.

Neither Lundin's testimony nor Mathia's note to Boxman describing what occurred on the date in question assert that Lundin was interfering with the work of any employees who were on the clock.

The Respondent avers that Lundin's testimony is suspect, first because the complaint alleges the events at issue occurred on November 17. Complaint paragraph 14(c),(iv), however, lists November 22 as the alleged date. Next, the Respondent asserts that it appeared the Lundin was basing his testimony on a typewritten note Mathia drafted because of a 1-day date discrepancy. (R. Br. pp. 44–45.) The handwritten date and time on the note was not authenticated, as Mathia did not testify. Who made the notation, and whether it referred to the date of the e-mail, the date of the events at issue, or neither is unclear. What is clear is that Mathia told Lundin to leave the premises while he was off the clock distributing union fliers. (GC Exh. 9.)

3. Alleged interrogation and threat

Finally, the complaint, at paragraphs 15 and 16, alleges that Fairbanks interrogated and threatened employees (i.e., Lundin) for joining, forming, and/or assisting the Union.

The alleged interrogation and threat is set forth in the statement of facts, but I will briefly recap it here. According to Lundin, Fairbanks asked him if he had joined the Company with the intention of going to war with it, which Lundin took to be an inquiry as to whether he was a salt. Fairbanks then complained about the impact of the Union's efforts on his ability to do his job. Fairbanks asked about Lundin's career goals, and told Lundin he and Fuiten would not forget what Lundin had done, and he would not be able to advance at Metro-West. Fairbanks denies making the comments ascribed to him, but I do not credit his testimony for the reasons set forth below.

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005). The Board also considers the timing of the interrogation and whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering, Inc.*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997); *Blue Flash Express*, 109 NLRB 591 (1954). These factors "are not to be mechanically applied"; they repre-

sent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, supra at fn. 20.

The first factor, for reasons that appear throughout this decision and do not require additional explanation here, weighs in the Acting General Counsel's favor. For purposes of resolving credibility, I am deciding the second factor (nature of the information sought) and fourth factor (place and method of interrogation) together. It is uncontested that the conversation occurred in Fairbanks' office. Fairbanks and Lundin differ on how they got there, however. Fairbanks stated that he and Lundin started talking during a crew social, casually meandered down the hall while most likely talking about the day, and naturally ended up in Fairbanks' office. Lundin stated that Fairbanks approached him as he was restocking and asked to meet with him to plan for the following Tuesday. As Lundin began filling out his time adjustment form, Fairbanks suggested that they just meet now, and told Lundin he would correct his time adjustment form to include pay for the meeting. I credit Lundin's account of events for a number of reasons. First, his demeanor was open and straightforward, and he responded naturally with much less prompting during his testimony. Lundin's version also is more plausible with regard to timing, as his shift ended just before 8 p.m. and the crew social had started at 5 p.m. Finally, Lundin's testimony was far more detailed and the chain of events he described more plausible. Fairbanks was not sure what he and Lundin discussed as they happened to walk down the hall to his office, and he said they ended up there because he "just naturally went in there and sat down." (Tr. 726.)

Based on Fairbanks' lack of candor about the meeting's origins, coupled with the fact that Lundin is a current employee testifying against the manager of his department, I resolve the credibility dispute about what occurred in Lundin's favor. As such, I find that Fairbanks asked Lundin if he came to Metro-West to overthrow the company or go to war with it. Accordingly, I find that the nature of the information sought weighs in the Acting General Counsel's favor. I likewise find the place and method of the interrogation factor weighs in the Acting General Counsel's favor. The conversation occurred in an office shared by two managers with nobody else present. Though it is clear from Fairbanks' choice of words that his question was rhetorical, it plainly reflected his serious displeasure with Lundin's union activities, and is therefore coercive. As detailed below, Fairbanks' followed his question with a comment disparaging the Union and a threat that Lundin's career would be harmed by his union activities.

The identity of the interrogator is Lundin's manager and second-line supervisor, a factor which also lies in the Acting General Counsel's favor. The truthfulness of the response is inapposite. Whether Lundin came to Metro-West to help the Union organize its employees was not at issue and therefore not developed in the record. Lundin was an open union supporter, and admitted such to Fairbanks during the meeting. This factor weighs in the Respondent's favor. The Respondent points out that the conversation took place after the union election, during a time when Lundin was not engaged in union activity. I agree that this weighs against a finding that Fairbanks unlawfully interrogated Lundin. Considering the totality of the circumstances, and particularly considering its proximity to the threat discussed directly below, however, I find that Fairbanks' inquiry was coercive.

The Respondent cites to *United Technologies Corp.*, 274 NLRB 1069, 1099 (1985), where the ALJ found that supervisors' casual questions that did not probe union officers' union sentiment were not coercive. In that case, however, the supervisors did not convey the employer's displeasure with union activity, as Fairbanks did here. In addition, the supervisors asked no questions about union activity, whereas Fairbanks basically asked Lundin if he was a salt. Accordingly, I find that the Acting General Counsel sustained its burden to prove that Fairbanks unlawfully interrogated Lundin.

In specifically assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire* , 308 NLRB 72 (1992). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

The Board has found threats that an employee will not advance in the company because of his or her union activities violate the Act. See *Prudential Insurance Co.,* 317 NLRB 357 (1995); *United States Air Conditioning Corp*., 128 NLRB 117, 126–127 (1960). In *Cleveland Trust Co.*, 102 NLRB 1497, 1498 (1953), enf. denied on other grounds *NLRB v. Cleveland Trust Co*., 214 F.2d 95 (6th Cir. 1954), the Union lost its representation election on May 23, 1951. The Board found that a supervisor's June 11 comment to an employee that she had let him down, was "in the doghouse" with the company's trust officer because she had voted for the Union, and that she was "digging her own grave" constituted a threat. I likewise find Fairbanks' comment was a coercive threat in violation of Section 8(a)(1) of the Act, despite the fact that the election had already occurred.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by enforcing a policy 701 concerning employee associations to prohibit employees from wearing union pins; promulgating, maintaining and selectively enforcing an overly-broad rule prohibiting employees from remaining on its premises when not working to discourage protected activities as set forth herein; engaging in unlawful surveillance of employees engaged in union activities and/or to discover employees' union activities; and by interrogating employee Neil Lundin about his union activities and threatening him with adverse consequences for engaging in union activities.

4. The Respondent violated Section 8(a)(1), (3), and (4) of the Act by disciplining, demoting, and terminating employee Travis Schlegel as set forth herein.

5. The Respondent violated Section 8(a)(1) and (3) of the Act by issuing a corrective action memorandum to employee Randy Watkins.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of the customary notice.

As I concluded that the Respondent enforced policy 701 to prohibit employees from wearing pins signifying support for the Union, the recommended order requires that the Respondent cease and desist from this practice.

Having unlawfully promulgated, maintained, and selectively enforced a rule against loitering or remaining on its property when not scheduled to work to discourage employees from forming, joining, or assisting the Union or engaging in other protected, concerted activities, the Respondent will be ordered to cease and desist from these actions.

Having engaged in unlawful surveillance of employees engaged in union activities or to discover employees' union or other protected, concerted activities, the Respondent will be ordered to cease and desist from this action.

Having interrogated employees about union activities and threatened employees with adverse consequences for engaging in union activities, the Respondent will be ordered to cease and desist from these actions.

Further, the Respondent having unlawfully disciplined Randy Watkins will be ordered to restore the status quo ante by rescinding the corrective action memorandum issued to him and making appropriate changes to his personnel files and/or other supervisor-maintained files.

The Respondent having unlawfully disciplined, demoted, and terminated Travis Schlegel will be required to restore the status quo ante by rescinding the unlawful October 27, 2010, and March 7, 2011 corrective action plans, the July 11, 2011 performance improvement plan, and the August 8, 2011 corrective action memorandum, and removing all references to those matters in its files. I will also order that the October 27, 2010 suspension be rescinded and all references to it removed from the Respondent's files. I will further order the Respondent to make Schlegel whole by offering him reinstatement into his position as a field training officer, or, if the field training officer position no longer exists, the Respondent shall offer reinstatement to a substantially equivalent position without prejudice to seniority and other rights and privileges; and by rescinding the making appropriate changes to his personnel files and/or other supervisor-maintained files. The Respondent shall also make Schlegel whole for any loss of earnings he may have suffered from the dates of his suspension, demotion, and discharge, respectively; the backpay will be less net earnings during such period and shall be computed on a quarterly basis, plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010*),* enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id. at 13. See, e.g., *Teamsters Local 25*, 358 NLRB 54 (2012).

Finally, the Acting General Counsel requests that the Respondent be required to: (1) reimburse Schlegel for any excess in Federal and State income taxes he may owe from receiving a lump-sum backpay award; and (2) submit appropriate documentation to the Social Security Administration so that Schlegel's backpay will be allocated to the appropriate periods. (GC Br. pp. 68–69.)

The Respondent offers no argument against these remedies in its posthearing brief, even though it was given notice in the complaint that the General Counsel intended to seek them (GC Exh. 1(aaa)). Further, the remedies do not on their face appear punitive in any way, and the Board has never held that they are punitive or otherwise inappropriate. However, the Board recently gave notice that, because such remedies have not been issued in the past, they should not be granted in individual cases in the absence of a full briefing. *Consumer Products Services, LLC*, 357 NLRB No. 87, slip op. at 2 fn. 3 (2011) (not reported in Board volumes). Thus, as the Acting General Counsel did not request such briefing, and permitting it would result in an undue delay, the General Counsel's request is denied.

[Recommended Order omitted from publication.]